Supreme Court, U.S
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No.

IN THE

Supreme Court of the United States

ROBUR OTERO CARRASQUILLO, MARIA T. NEGRON CEDENO AND THE CONJUGAL PARTNERSHIP FORMED BETWEEN THEM AND JENNIFER OTERO M. NEGRON, PETITIONERS

v.

PHARMACIA CORPORATION; PFIZER PHARMACEUTICALS; ZAIDA SANABRIA IN HER OFFICIAL AND PERSONAL CAPACITY; COMPANIES X, Y, Z, JANE DOE AND JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether during the appeal stage of a case, an Appeals Court can decide for the first time and on its own that the eligibility provision of a Summary Plan Description ("SPD") of an ERISA severance payment plan, drafted by the employer and given to its affected employees, is "inoperative" when it was never raised as an issue in the case.

Whether the plan administrator's reliance on the language of the eligibility provision of an SPD in denying severance benefits to an employee can be disregarded and replaced by a new decision issued on appeal that the language of the plan document and not the SPD controls.

Whether the ERISA preempts an independent fraudulent inducement claim when the moment that an employee decides to request the severance benefits was the time the employer represented he had to apply and then denied the benefits determining his application was late.

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The opinion of the Court of Appeals is reported as No. 05-2373 (1st Cir. 1006) 2006 U.S. Lexis 25257. It is reproduced in the Appendix at p. 1-16. The opinion of the district court granting defendant's motion for summary judgment is reported in 382 F. Supp. 2d 300 (2005); 2005 U.S. Dist. Lexis 17573 (D.P.R. 2005) and it is reproduced in the Appendix at p. 17-46.

JURISDICTION

The court of appeals judgment was entered on October 6, 2006. A timely petition for rehearing was denied on December 26, 2006. App. at 47. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

Otero was hired to work at Pharmacia in June 1973. He held the position of Lead Microbiologist. He then held the position of Research Associate III in which he was in charge of the production of the antibiotic Lincomycin at Pharmacia's fermentation plant. The fermentation of this antibiotic was a costly and delicate process which made millions for Pharmacia. Otero became its most crucial employee. His dedication, experience and knowledge were such that he was normally referred to as the "Lincomycin encyclopedia".[1]

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[1]During relevant times, Otero was the president of the Microbiologist Association of Puerto Rico.

In February 2000, Pharmacia announced the closing of the fermentation plant. Otero and the rest of the employees were informed that the closing would be effective by June 2001 and that the fermentation process would continue in Kalamazoo, Michigan, where another fermentation facility is located and where the production of Lincomycin was cheaper.[2]

In October 2000, Pharmacia informed the fermentation plant employees that they were eligible for severance benefits under Pharmacia's Separation Payment Plan ("SPP"). The plan was administered by Pharmacia. The SPP was intended to provide severance benefits to employees who lost their jobs due to job elimination, job restructuring or non-performance. With respect to the decisions they were to make as to their future, the employees at fermentation were provided with several alternatives to choose from. They had the option of seeking another position in the company, refuse any offer of any position or, request the SPP benefits.

Pharmacia provided the employees a Summary Plan Description ("SPD") of the SPP. The SPD was translated by Pharmacia in the Spanish language. The SPD was translated back to the English language *ad verbatim* during the judicial proceedings.

To request the severance benefits, the SPD had an expiration date of December 31, 2001. The SPD also had a General Eligibility provision. The relevant provision states that "the benefits under the Plan shall not be provided to any

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[2]The First Circuit's factual statement that the plant was "relocated" to Kalamazoo was disputed by Otero in its opposition to the motion for summary judgment by factual admissible evidence including admissions of Pharmacia's supervisors. Rather, the fermentation process was to continue in Kalamazoo, Michigan, where the main production fermentation plant facility had been located for years.

Employee who's *employment termination is due to (6) his or her transfer* to an affiliate company *or* its transfer due to the total or partial sale of the Company either by the sale of its stocks or assets *in which the Employee is offered a "Similar Position"* (as that term is defined hereinafter) with the Company or successor employer." (Emphasis Added).

According to the language of the SPD, Otero understood that for him not to be eligible, his termination as a Research Associate III had to be the result of his transfer to an affiliate company *or* its transfer as a result of the sale of the company's stocks where Otero was offered a similar position in the company or the successor employer. Because Otero's employment was not eliminated due to any of these two ineligibility provisions, the only limitation for Otero under the SPD was to present his request for benefits before the expiration date, that is, on or before December 31, 2001.

Shortly after the announcement of the SPP, Otero's supervisor at the fermentation plant, Andrés Lugo, represented to Otero that he could not request the severance benefits until the last fermentation lot was produced.[3] This required Otero to stay at the plant for the months to come. Lugo also assured Otero that he would be offered a similar position during this time and that he did not have to worry.

Pharmacia had not disclosed any information regarding the creation of an "Exit Windows Program" it had implemented which changed the expiration date reflected in the SPD to request the benefits. No documents nor any type of information were given to the employees at fermentation

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[3]In fact, the record undisputable shows that Lugo admitted he induced Otero to continue working by relying on the representation that he could not request the SPP benefits until the last fermentation lot was produced.

regarding the existence of this program.

During the next months, Pharmacia increased the production of Lincomycin. Otero stayed working alone at the plant while other employees were transferred to other positions or selected SPP benefits. Otero began to inquire about his future at Pharmacia and as to the alleged offers of a similar position Lugo had promised him, to no avail. By the month of March 2001, Otero's supervisors noticed he was distressed and increasingly concerned about his future. Otero filed applications to several vacant positions he qualified but not even an interview was afforded to him. Months passed without any information.

In August 20, 2001, Pharmacia gave Otero a letter designating him to the Microbiology Laboratory of Quality Control as a Microbiologist III. The letter did not mention it had any relation with the SPP and much less with the plan's eligibility requirements. Otero found that this designation was a demotion and decided he would wait until the last production of the fermentation lot was produced to apply for the SPP benefits.

On November 5, 2001, the day after the last fermentation lot was produced, Otero handed to Zaida Sanabria ("Sanabria"),the written request for the SPP benefits.[4] Sanabria told him she thought he was late. On November 6, 2001, Pharmacia's Human Resources Director, Linda Diaz, issued an electronic communication to Sanabria that Otero was ineligible because the window program for P.R. had closed two weeks earlier and that she could not considered any additional candidates. Otero was not notified about Diaz' response to Sanabria. As such, on November 9th

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[4]Sanabria became Otero's supervisor after Andrés Lugo was transferred to another facility on or about the month of March 2001.

2001, Otero wrote an electronic mail to Sanabria claiming that the SPP provided until December 31, 2001 to apply. On November 12, 2001, Otero read the electronic communication from Sanabria confirming that it was too late to accept his SPP request. On that day, Otero went to the office of Human Resources Manager, Carmen Calcao, to present his second written request for the SPP benefits. While at her office, Otero suffered a severe emotional breakdown and fell in the floor. After he regained consciousness, Otero insisted in his request of the SPP benefits. Calcao told him that she needed to contact Human Resources Director for the details. Diaz then told Calcao that Otero could not be considered as a candidate for the SPP because the date to apply for the SPP was before December 31, 2001 and that Otero was late.

Thereafter, Pharmacia provided three different reasons for the denial of benefits. In a letter dated December 12, 2001, Pharmacia retracted from the original reason in denying the benefits to Otero and informed him that according to the eligibility provision of the SPD, he was not eligible because he was offered a similar position. In a letter dated June 9, 2003, Pharmacia informed Otero that the reason for denying the benefits was that the administrative windows for the SPP plan were closed at the date of Otero's request even though the plan continued in effect until December 31, 2001. The letter also stated that he was offered a comparable position which also made him ineligible for the benefits. In another letter dated November 17, 2003, Pharmacia stated that the reason for the denial of the SPP benefits was that Pharmacia offered Otero a similar position. In support of its decision, Pharmacia cited the eligibility provision of the SPD which provides in its pertinent part that: "No benefits will be provided under the Plan to any employee *whose termination of employment was due to (6) his transfer to a member company, or his transfer* because of the whole or partial sale

of the company, whether through the sale of shares or assets, where he has been offered a "Similar Position" (as said term is explained hereinafter) with the Company or the succeeding employer." (Emphasis Added).

As a result of his emotional breakdown, Otero suffered serious back injuries. He spent 49 days hospitalized, his discs were displaced and a condition known as Cauda Equina developed, which is a compression of the nerves of the dorsal spine. A back surgery was performed on Otero on November 29, 2001. His injuries remained severe requiring extensive psychological and psychiatric intervention and Otero began receiving long term disability benefits pursuant to Pharmacia's long term disability program.

The Complaint

Petitioners Robur Otero, Maria T. Negron and Jennifer Otero Negrón filed a complaint in the United States District Court for the District of Puerto Rico against Pharmacia Corporation ("Pharmacia"), former employer of petitioner Robur Otero.[5] The complaint raised violations to the provisions of the Employee Retirement Income Security Act (ERISA"), 29 U.S.C. A. §1001 et seq., for breach of fiduciary duty for the concealment of the windows program, wrongful denial of benefits and failure to disclose the SPD of the long term disability program. Petitioners also presented claims under the local tort statute, Article 1802 of the Puerto Rico's Civil Code, (31 L.P.R. Ann § 5141) for fraudulent inducement and intentional infliction of emotional distress. An independent state law claim was also filed against Otero's former supervisor Zaida Sanabria in her individual and official capacity. These claims were filed for the damages suffered caused by Pharmacia's fraudulent inducement to

[5] Pharmacia is currently a subsidiary of Pfizer, Inc.

Otero that he could not request the SPP benefits until after the last production lot was produced. This produced Otero an emotional breakdown when he found out that he was late in his application for the benefits.

District Court's Proceedings

Defendant filed a motion for summary judgment and petitioners opposed. The district court granted the motion and dismissed with prejudice plaintiffs' ERISA's breach of fiduciary and unlawful denial of benefits claims. As to the state law claims for fraudulent inducement and intentional infliction of emotional distress the district court held that ERISA preempted them. As to the claim of violations to the ERISA disclosure requirement, the district court found that Pharmacia failed to produce the information requested in 30 days and imposed the amount of $2,500.00 in penalties.

In its opinion, the district court held that under the SPD's eligibility provision, Pharmacia's determination that Otero was not eligible because he *resigned* from the company after being assigned to a comparable position was reasonable. The district court also held that ERISA preempted the state law claims because in the complaint, the fraudulent inducement and negligent/intentional infliction of emotional distress claims refer to the SPP and thus, plan would need to be consulted in order to solve them.

Appeal to the First Circuit

Petitioners appealed to the First Circuit arguing *inter alia* that the district court substituted its own decision with that of the plan administrator by deciding without any basis in the record that Otero was ineligible to the benefits because he resigned. Petitioners argued that the so called "resignation" was never a basis for the denial of benefits by Pharmacia and

to the contrary, the position was eliminated as a result of the closing of the fermentation plant. In fact, Pharmacia has ever argued that Otero resigned.

Petitioners also argued that Pharmacia breached its fiduciary duty for the concealment of a windows exit program which prevented Otero from timely filing his application for the SPP benefits.

As to the SPD eligibility provision, petitioners argued that the district court's determination that an offer to a comparable position made Otero ineligible is not what the plain text of the SPD states. That the SPD clearly provided that for Otero to be ineligible, his employment as a Research Associate III had to be eliminated as a result of his transfer to any affiliate company nor to any corporation as a result of a sales of Pharmacia's stocks and assets where he was offered a similar position. Because the terms of the SPD are clear, simple and unambiguous, Otero argued he should have been granted the SPP benefits.

As to the ERISA preemption, petitioners' argued that the facts that supported the misrepresentations and fraudulent inducement claims did not involve any interpretation of the SPP and that mere references in the complaint of the SPP did not mean that ERISA preempted these claims. That the court should have considered all the factual and admissible evidence presented in Otero's opposition to the motion for summary judgment, that supported plaintiffs' fraudulent inducement and misrepresentation claims.

As to the disclosure requirement, petitioners insisted that because the SPD was never provided until after the lawsuit was filed, a written letter explaining the nonexistence of a serious health classification of the LTD plan was not sufficient under ERISA.

The Decision of the First Circuit

The First Circuit affirmed the district court's decision. However, it did not construe the language of the SPD which had been the issue throughout the judicial proceedings of the case. Instead, the First Circuit, in a surprising decision, decided that the SPD was "inoperative" because its translations to the Spanish language conflicted with the terms of the original plan document. Interestingly, however, it affirmed the district court's interpretation of the SPD in denying Otero's request for benefits.

In response to petitioners' argument that the ERISA did not preempt Puerto Rico's tort law, the First Circuit held that in order to determine the fraudulent inducement claim, the court would have to consult the severance plan to identify the application dates and the administrative process for determining and informing the employees of such dates.

Petitioners requested the First Circuit for panel rehearing or rehearing en banc. In their submission, petitioners argued that the unprecedented decision regarding the lack of effectiveness of the SPD for the first time on appeal will affect millions of employees that rely on that document in making their future employment decisions. That for the first time in the judicial process of this case, the Appeals Court decided that the SPD was inoperative when all parties had construed its terms when arguing their positions before the district court.

More importantly, petitioners claimed that Pharmacia's specific reason for denying Otero's benefits request relied on the language of the SPD. Even the district court relied in the language of the SPD in granting the motion for summary judgment. Petitioners never had the opportunity to defend themselves as to the issue of whether the SPD's

eligibility provision was inoperative or whether it in fact conflicted with the language of the plan document.

As to the preemption issue, petitioners argued that the fraudulent inducement and misrepresentations were made to Otero before he requested the SPP benefits, that they had no connection with the denial of benefits, that the SPD did not have to be interpreted in order to solve the fraudulent inducement claims and that the damages requested do not involve the payment of the benefits.

The court of appeals denied the petition.

REASONS FOR GRANTING THE PETITION

ERISA currently governs approximately 730,000 private pension plans and six million private health and welfare plans.[6] Protecting the American's health and retirement benefits has become an utmost public policy concern.

A Supreme Court decision on the issues presented in this case would be significant because a universal standard for the administration and enforcement of the SPD's is in the best interest of employees and retirees around the country. This Court should also resolve a conflict in the decision of the First Circuit with this Court's precedent as well as its own legal precedent as to under what circumstances, an appeals court can decide for the first time an issue that was never presented and without giving the opportunity to the employee, prejudiced by the decision, to argue against it.

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[6] U.S. Department of Labor, Employee Benefits Security Administration, Congressional Testimony, March 12, 2007 (www.dol.gov/ebsa).

The decision of this Court would also clarify an issue of great importance regarding the far-reaching legal and practical effects of the decision attributing to the employees the responsibility for erroneous and inaccurate SPD's drafted by employers. Also, the issue presented creates a conflict with the other circuits which is recurring and of great practical importance. To begin with, employers are free and immunized in drafting careless and inaccurate SPD's.[7] The employees will pay the price with their future retirement benefits. This is certainly is not consistent with the public policy involved in these type of cases.

1. First Circuit decision is in direct conflict with this Court's decision in *Singleton v. Wulff*[8] and its own legal precedent by deciding a waived issue.

The pertinent SPD's eligibility provision states as follows:

> "benefits under the Plan shall not be provided to any Employee [whose] *employment termination is due to* ...(6) *his or her transfer* to an affiliate company or its transfer due to the total or partial sale of the Company, either by the sale of its stocks or assets in

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[7]Even the attorneys of Pharmacia wrote an article in their Employee Benefits newsletter addressing the issue and recommending the employers to write a disclaimer that any contradiction between the two documents the plan will prevail, in order *"to provide further buttressing to a plan's defense in the face of employee claims under ERISA, based on erroneously translated plan documents. Also, a Spanish-speaking legal professional should revise any translation in order to ensure it is correct and complete." See, Schuster & Aguilo,,LLP., Employee Benefits, November 13, 2006 issue.* This is the message currently sent to all employers and unfortunately, the admittedly erroneous translation was attributed to the petitioner.

[8] 428 U.S. 106

> which the Employee is offered a "Similar Position" with the Company or successor employer." (Emphasis Added).

The First Circuit decided that the foregoing version is inoperative and instead, relied on the following relevant part of the plan document:

> "... a terminated employee will not be considered to have incurred an Employment Termination Date due to his Job Elimination, Job Restructuring, or Non-Performance for the purposes of this Plan if his or her employment is discontinued due to ...(vi) *a transfer* to an affiliated business, the sale of Pharmacia & Upjohn, Inc. or any portion thereof, either through a sale or exchange of stock or assets, or the outsourcing of a division, department, business unit or function where the Employee has been offered a Comparable Position with the Company or the new employer." *(Emphasis Added).*

In granting summary judgment, the district court decided that Otero was ineligible for the SPP benefits because he resigned and was offered a similar position. The district court relied on the language of the SPD to make that determination even though the plan administrator never denied the benefits to Otero on any resignation basis. Consequently, whether Otero resigned or not became a primary issue on appeal because Otero's position was eliminated as a result of the plant's closing. An additional issue on appeal was raised regarding the omission in the SPD's eligibility provision that an offer of a similar position in itself made Otero ineligible for the benefits. Therefore, the contested issues on appeal involve the construction of the eligibility provisions of the SPD and not the plan document.

Instead of deciding the issues raised on appeal, the First Circuit did not construe the language of the SPD and in an unexpected decision, decided that the translation of the SPD was in conflict with the language of the plan document. Therefore, it held that plan document controls because the Spanish language translation stated on its front page that any terminological discrepancy between it and the original English language version would be resolved in accordance with the original Plan.

In the present case, there is no dispute that the Spanish translation of the SPD was the document given to the fermentation plant employees in Puerto Rico. There is no contest that it is Pharmacia's own translations. There is no contest that in denying Otero's request for benefits, Pharmacia relied on the eligibility provision of the SPD. There is also no contest that the district court relied on the language of the SPD in issuing its decision to dismiss petitioners' ERISA claim.[9]

The First Circuit's decision resulted in a miscarriage of justice for petitioners who were never notified by anyone that the effectiveness of the SPD's eligibility provision would be an issue in the case. It is not until the appeal to the First

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[9] For instance, the following excerpts of the district court are relevant to incorporate here: "In February 2001,all fermentation plant employees received a Spanish translation of the summary plan description of the SPP (SPD"), which outlined in layman's terms the general contours of the SPP. According to the SPD..." App. at 19a . "The SPD, which was provided to all affected employees, also states that Defendant Pharmacia has discretionary authority in this regard..." App. at 26a. "The second paragraph of the SPD, which outlines in layman terms SPP eligibility, reads, "The benefits under the Plan shall not be provided to any Employee whose employment termination is due to (his or her voluntary resignation from the Company..." App. at p. 28a . Thus, the construction of the SPD's eligibility provision has always been the main issue in this case.

Circuit that Otero and Pharmacia were notified that the eligibility provisions of the SPD were inoperative. The First Circuit relied on an issue that was waived by Pharmacia because the alleged conflict between the SPD and the original plan document was never argued by anyone and was never considered an issue in the case.

The First Circuit's decision conflicts with this Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), where this Honorable Court held that: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. The court cited with approval *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), holding that it is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Just like the *Singleton* case, the First Circuit had no idea what evidence, if any, petitioner would, or could, offer in defense of the new decision about the SPD because petitioner has had no opportunity to proffer such evidence. The Supreme Court held that under these circumstances, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the new decision. More importantly, while recognizing as a general rule the discretion of the Court of Appeals to decide issues not raised below, this Honorable Court emphasized the injustice that the lack of opportunity for petitioner in the *Singleton* case caused him. In this regard, this Court stated because the issue resolved by the Court of Appeals has never been passed upon in any decision of this Court, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

The decision of the First Circuit also destabilizes its own judicial decisions that a party waives issues on appeal that have not been previously raised. In *Mulero-Rodríguez v. Ponte, Inc.*, 98 F.3d 670, 679 (1st Cir. 1996), the First Circuit held that appellants' silence as to a particular legal argument before the trial court amounted to waiver of that issue on appeal. Likewise, in *Delaney v. Commissioner of Internal Revenue,* 99 F. 3d 20 (1st Cir. 1996), the First Circuit recognized that "a litigant has an obligation 'to spell out its arguments squarely and distinctly' . . . or else forever hold its peace." (Citing *Rivera-Gómez v. Castro*, 843 F.2d 631 (1st Cir. 1988).

Instead of committing to its own precedent, the First Circuit punished the petitioners with a decision they did not know was coming. They were prevented from putting forth a argument regarding the SPD's effectiveness and Otero's reliance on its language. In order to make a proper determination, the First Circuit should have required factual evidence from Otero regarding his reliance in the wording of a faulty or inaccurate SPD. See, *Govoni v. Bricklayers, Masons & Plasterers Int'l Union*, 732 F.2d 250, 252 (1st Cir. 1984) (to secure relief based on the summary plan description, the plan participant "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description."). This case should at least be remanded to inquire as to Otero's reliance on the SPD. See, *Aiken v. Policy Management Sys. Corp.*, 13 F. 3d 138 (4th Cir. 1993) (in a conflict between the summary and the plan, the case remanded for further inquiry into whether plaintiff had relied or would suffer prejudice).

The First Circuit's decision has a significant impact on the petitioner and the whole population of employees who relied on the language of SPD's in making retirement and significant employment decisions. The consequences of the

decision of the First Circuit is devastating for employees around the nation and sends the wrong message to the employers that they have a *carte blanche* to draft inaccurate SPD's because the employee will end up paying the price.

2. The decision of the First Circuit creates a conflict with other circuits over whether which document governs when the employer drafts an erroneous translation of an SPD.

It is well settled among other circuits that it would be unfair to have the employees bear the burden of a conflicting SPD and the plan master document. The Tenth Circuit has held that when this occurs, the provision more favorable to the employee controls. *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir.1996). Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. *Bergt v. Retirement Plan*, 2002 U.S. App. LEXIS 12034.

Likewise, the Second Circuit has held that the SPD is intended to be an employee's foremost resource on the terms of the Plan and, where the plan documents and the SPD conflict, the SPD controls. *Heidgerd v. Olin Corp.*, 906 F. 2d 903, 907 (2d Cir. 1990). The Fifth Circuit has also stated that the summary plan description is binding, and that if there is a conflict between the summary plan description and the terms of the policy, the summary plan description shall govern. *Hansen v. Continental Ins.* Co., 940 F.2d 971, 982 (5th Cir. 1991). The Sixth Circuit has also held that the summary governs over the plan when there is a discrepancy. *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136-37 (6th

Cir. 1988). Also, the Ninth Circuit has stated that "we must construe ambiguities in an ERISA plan against the drafter."*Barnes v. Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1393 (9th Cir. 1995).

On the other hand, in evaluating the text of both documents, the eligibility provision of the SPD was more favorable to Otero. The First Circuit however, chose to apply the document with the less favorable language in determining that Otero was not eligible under the SPP. It is well settled that principles of contract law apply in ERISA plans. As such, the contract law provides that when a contract is open to two constructions the one more favorable to the insured will be adopted. *See, Aschenbrenner v. United States Fidelity & Guaranty Co.*, 292 U.S. 80, 85 (1934) (where the contract language "is reasonably open to two constructions, that more favorable to the insured will be adopted".)

This Court should decide this issue inasmuch as the decision of the First Circuit creates a substantial impact in the thousands of cases where reliance in the SPD's are made by millions of employees with respect to their right to obtain severance retirement benefits. This will have an enormous impact in ERISA litigation. Also, this Honorable Court should provide a strong incentive for employers to write accurate the SPD's so that they are consistent with the ERISA plan master documents. For millions of employees around the nation, these SPD's are the bibles as they count on their language to make the most important decisions in their lives, their future. It is highly unfair to penalize employees, who relied on an inaccurate language written by employers and who will be denied his retirement benefits as a result.

3. The First Circuit Decision Destabilizes it own legal precedent published in *Glista v. Unum Life Insurance Co. Of America*, 378 F. 3d 113 (1st Cir. 2004)

Plan administrators governed by ERISA must provide claimants with the specific reasons for a denial of claims and may not defend in court a denial of benefits on the basis of a different reason than that articulated to the claimant during the internal review process. This is what the First Circuit has established in *Glista v. Unum Life Insurance Co. Of America*, 378 F. 3d 113 (1st Cir. 2004). Therefore, according to *Glista*, the reason for denying ERISA benefits cannot be modified by a plan administrator during a judicial proceeding.

In this case, the initial reasons provided by the plan administrator in denying Otero's request for benefits was the so called "windows program" was closed for Puerto Rico. Thereafter, the plan administrator stated that the reason for denying the benefits was because Otero was offered a similar position and thus, according to the eligibility provision of the SPD, he was not eligible. These two reasons were the only ones issued by the plan administrator and specified to Otero.

If Pharmacia used the language of the SPD in denying Otero the benefits, it was the SPD the version that should have been used in determining whether Otero was eligible or not. Instead, the Court of Appeals on its own annulled the reasoning of the plan administrator in denying the benefits to Otero and in so doing, it erroneously assumed the role of the plan administrator by creating a new eligibility criteria in the decision denying Otero's request for the SPP benefits. This is a direct conflict with *Glista* as not even the plan administrator can change the reason for the denial of the benefits in a judicial process. It thus, stands to reason that much less can a court disregard the administrator's basis for the denial by supplanting it with its own.

Furthermore, the decision of the First Circuit is contrary to federal law. Under ERISA, when a plan denies benefits, it is required to provide a notification that sets forth "specific reasons for such a denial, written in a manner calculated to be understood by the participant." 29 U.S.C. § 1133. The First Circuit did not follow the language of this statute and decided that the SPD translation provided by Pharmacia to its employees was erroneous and attributed the violation to this statute against Otero instead of Pharmacia, who was the drafter. This is certainly not a reasonable and just result. If the First Circuit decided that the SPD was erroneously drafted, it should have granted summary judgment to Otero and order the plan administrator to pay the benefits that he sought. See, *Glista v. Unum Life Insurance Co.*, supra.

On the other hand, the decision of the First Circuit raises a significant precedent to the courts' evaluation of the reasons of plan administrators in denying benefits. The First Circuit affirmed the district court who used the language of the eligibility provision of the SPD and not the plan document. Therefore, it created an incoherent result because if the eligibility provision of the SPD is inoperative, how can the decision of the district court be affirmed when it never used the plan document in determining that Otero was ineligible for the SPP benefits?

More importantly, the plan document expressly instructs that: "The notice advising of the denial shall specify the reason or reasons for denial, *make specific reference to pertinent plan provisions*, describe any additional material or information necessary for the claimant to perfect claim..." (Emphasis Added). The First Circuit's decision implicitly holds that the administrator's notice in this case to Otero was defective because the eligibility provision it used in denying Otero's benefits was inoperative. In any case, Otero has been

the one suffering from all these errors well beyond his control.

On the other hand, the First Circuit also held that Pharmacia's interpretation of the eligibility provision that an employee is ineligible to receive benefits when his job is eliminated due to a transfer to an affiliated business was not unreasonable. But again, "a transfer to an affiliated business" was never the reason for the denial of benefits given to Otero. The decision contravenes the legal precedent that establishes that courts cannot assume the role of plan administrators. Not one of the several written denial of benefits mentions he was not eligible because his employment was eliminated due to a transfer to Kalamazoo, Michigan, which is what the First Circuit held. This also contravenes the First Circuit's ruling in *Glista v. Unum Life Ins.*, supra, that "Congress intended ERISA insurers to speak clearly, in plain language, to plan recipients."

The First Circuit substituted the decision of the plan administrator with its own. The decision conflicts with the majority of the court's decisions prohibiting courts to substitute its judgment for that of the plan administrator. The Sixth Circuit has held that nothing in ERISA's legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators. See, *Perry v. Simplicity Eng'g*, 900 F. 2d 963, 966 (6th Cir. 1990). The Court's role is limited to determining whether the administrator reached a reasonable and impartial decision in light of the evidence with which it was presented. *Goodman v. S & A Restaurant Corp.*, 821 F. Supp. 1139, 1145 (S.D. Miss. 1993). Likewise, the Fifth Circuit held that courts simply cannot supplant plan administrators. *Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552, 1559 (5th Cir. 1991).

Also, the decision contravenes the opinion in *Bard v. Boston Shipping Association*, No. 06-1810 (1st Cir. 2006), where the First Circuit recently stated that the factual determination of eligibility for benefits is decided solely on the administrative record. The administrative record as presented on appeal reveals that the basis for denying Otero 's request for the SPP benefits did not include any transfer to any affiliated business.

Lastly, the First Circuit's interpretation of the plan is unreasonable as all the fermentation plant employees at Pharmacia would have become ineligible because their positions were eliminated as a result of the alleged "transfer" to the Kalamazoo plant. The reason for the elimination of these employees' positions was due to the closing of the fermentation plant and this is an undisputed fact. Their positions were not eliminated as a result of a transfer to an affiliate business and if that was the case, none of these employees would have become eligible under the plan. To this end, the First Circuit has stated that the words appear in a severance pay plan and that the usual purpose of such a plan is, first and foremost, to provide employees with a buffer against the privations which so often attend unforeseen layoffs. *Allen v. Adage Inc.*, 967 F. 2d 695 (1st Cir. 1992).

In light of the foregoing, the decision issued by the First Circuit creates an unstable precedent in the interpretation of plan documents and the role that courts must undertake in evaluating eligibility of ERISA benefits to employees against the rationale used by a plan administrator in denying the benefits.

4. The decision of the First Circuit conflicts with this Court's Decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.* and with its own legal precedent which requires courts to look at the proof instead of the complaint only in deciding an ERISA preemption issue at the summary judgment stage.

Petitioners' complaint included a action of damages for fraudulent inducement and intentional infliction of emotional distress under Puerto Rico's tort statute. Otero alleged that Pharmacia tricked and deceived him by falsely representing him that he could not seek the SPP benefits until the last fermentation lot was produced. This is a typical tort claim and it can easily be distinguished from the ERISA claims. The claims do not allege that the SPP was negligently administered, are not about an improper processing of the plan and do not relate to the administration or the disbursement of the SPP plan.

In support of the state law claims, evidence from Otero's deposition testimony was incorporated in the appeals record where he testified that he was lured into a false sense of security and that the company took advantage of his knowledge, experience, as the person who could work at the plant until the end of the fermentation process. This misrepresentations prevented him of applying in a prompt manner the SPP benefits. As a result, he suffered an emotional breakdown which caused him severe injuries which are the damages he claims under article 1802. The deposition testimony of Jesus Rivera, former operator of Pharmacia, was also presented in record. Rivera testified that Otero was stressed and anxious because the company was ignoring him. Rivera also corroborates Lugo's misrepresentation that Otero could not leave the company until the last production of Lincomycin was finished and as to

the company's mistreatment towards Otero.

However, the First Circuit Court's decision failed to look into these facts limiting the evaluation to the allegations of the complaint as the district court did. This is contrary to the First Circuit's ruling that courts are required to look at the facts of a particular case to evaluate whether a state law relates to an ERISA plan or is merely tenuous, remote or peripheral. *Rosario- Cordero v. Crowley Towing & Transp. Co.*, 46 F. 3d 120, 125 n.2 (1st Cir. 1995). The First Circuit erred by relying exclusively to the complaint and omitting the record. See, *Danca v. Private Health Care,* 185 F. 3d 1 (1st Cir. 1999) (court must look beyond the face of the complaint and determine the real nature of the claim). See also, *Euromodas Inc. v. Zanella,* 368 F. 3d 11, 17 (1st Cir. 2004) ("We must examine this conclusion in light of the full summary judgment record. In carrying out that task, we remain cognizant that *the proper office of summary judgment is to pierce the boilerplate of the pleadings and assess the proof* in order to determine the need for a trial.").

In its decision, the First Circuit held that the complaint reveals that the fraudulent inducement claim concerned (1) representation made by Pharmacia in informing him that he could not apply of severance benefits until all fermentation at Arecibo was completed; (2) changing the benefits application deadline without informing him; (3) falsely promising him a comparable position at the company whenever he expressed concerned for his job security. The Circuit reasoned that under these allegations, the court would have to consult the plan to identify the application dates and the administrative process for determining and informing the employees of such dates.

The rationale of the First Circuit in finding preemption is incorrect. The misrepresentation made by

Pharmacia in informing Otero that he could not apply of severance benefits until all fermentation at Arecibo was completed has no relationship with the interpretation of the SPP plan. Rather, the only focus is whether the company benefitted financially in deceiving Otero by making him believed that he was unable to seek the SPP until a last fermentation lot was produced. The court does not need to evaluate whether the decision of Pharmacia to deny the benefits was proper or not. Whether the fraudulent inducement by Pharmacia caused Otero to lose the benefits does not require the court to construe any provision of the SPP. Furthermore, if the exit windows program was not the basis for the denial of Otero's benefits according to the First Circuit, then the administration of this program is irrelevant and does not have to be evaluated.

Likewise, the allegation that a change in the benefits' application deadline without informing him does not requires the court to evaluate the SPP. In fact, the employer's actions in concealing relevant dates for application to Otero does not require the court to interpret the plan's terms. The focus of the fraudulent inducement claims is not on the plan but on the misrepresentations given to Otero which gave him a false sense of security. The fraudulent inducement claims involve the intentional actions in inducing plaintiff to keep working under the false impression that he would be able to obtain the benefits of the "package" once the last production was over. The inducement was false and plaintiff lost the benefits because he stayed working under Pharmacia's representations that he could not seek the benefits. This is all what the Court has to consider. The wrongful denial of benefits as a result of the illegal interpretation of the SPD is a separate cause of action under ERISA.

The preemption issue in this case is very similar to the one presented in *Cuoco v. Nynex, Inc.*, 722 F. Supp. 884 (D.

Mass. 1989), where the plaintiff alleged that the defendant made a series of misrepresentations regarding her benefit coverage. The Court held that plaintiff's claims arise not from the deprivation of any rights under the plan but from the series of promises and misrepresentations which were allegedly made to her by defendants. Most importantly, the Court sustained that plaintiff, as happened here, was *lured into a false sense of security* as to her health insurance. "When the resolution of state law claims will neither 'determine whether any benefits are paid' nor directly affect the administration of benefits under the plan, the claims do not 'relate to' ERISA and accordingly are not preempted." *Id.* at 887. Likewise, in *Smith v. Texas Children's Hospital*, 84 F. 3d 152 (5th Cir. 1996), the Fifth Circuit held that preemption did not apply to the plaintiff's fraudulent inducement claim and concluded that the plaintiff could have a claim based on the benefits plaintiff lost as a result of being induced to leave her former employer. The issue in the *Smith* case is the exact issue here where the Fifth Circuit stated that: "The ultimate question of Texas Children's liability for fraudulently inducing Smith to leave St. Luke's turns not on the quantum of benefits available at Texas Children's, but on the question whether Texas Children's misled Smith when it told her that she would keep what she had."

Similarly, in *Industrial Technical Services v. Phoenix Home life Mutual Ins. Co.*, 866 F. Supp. 48, (D. Mass.1994), the plaintiff filed a claim of misrepresentation alleging that based on the promise made by its insurer, to provide identical benefits in its own policy from a competitor's proposal, it entered into the life insurance contracts with the defendant. As to the specific question of whether the claims of misrepresentation were preempted, the Court concluded that: "Taking up the specific question under consideration in this case, other circuits have held that claims of misrepresentation with regard to the terms of an employee benefit plan are not

preempted by ERISA."

With respect to the First Circuit's decision that the promises of comparable position were based on the plan provision is also incorrect. Otero's complaint states that he was induced by his supervisor to continue working by falsely representing to him that he would be placed in a position similar to the one he held. This promise had no relation to the SPP. This representation had absolutely no connection with the SPP. The mere coincidence that Lugo's false promises of a similar position and the fact that the SPD mentions a similar position in its eligibility provision is pure coincidence. Otero's allegation was that he relied on the promise of a similar position and was left alone running the Fermentation plant by himself to satisfy his employer's greed. Otero alleged that he was deceived, tricked by the Company while the latter was benefitting substantially from his work. Under these circumstances, the court does not have to interpret the SPP to decide whether defendants deceived and misrepresented to Otero that he could not seek the SPP benefits until the last fermentation lot was produced.

Allowing state negligence claims against employers for misrepresenting employee about their work future and inducing them to continue working under false pretenses does not trespasses the policies that ERISA was designed to protect. Immunizing employers from these type of claims would create a serious impact in the employment world and the labor force. The Congressional intent in enacting ERISA is to provide protection for the interests of participants and beneficiaries of employee benefits plans. This purpose is not advanced by preemption of state tort law claims by participants targeting misconduct that occurred *prior* to the decision made by Otero to request the SPP benefits and when the conduct has no effect on the administration and structure of the SPP plan. Thus, there is no Congressional purpose

served by preemption on Otero's state law claims. Accordingly, the First Circuit erred in finding Otero's state law claim against Pharmacia preempted. The mere fact that the complaint refers to the SPP is only incidental.

Otero's claims are focused on an area of traditional state power and no duties are imposed upon Pharmacia as the plan administrator by any of these claims. This Honorable Court has held that ERISA does not preempt plans from "run-of-the mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 at 833 (1988). at 833 (ERISA does not forbid garnishment under state law of an ERISA welfare benefit plan, even where the purpose is to collect judgment against plan participants).

Nowhere in ERISA did Congress create a cause of action to fraudulent inducement made by employers regarding the future employment of its employees for their economic advantage. Pharmacia lured Otero into a false sense of employment security and ERISA does not regulate these claims and supplant Puerto Rico's Article 1802. To hold otherwise, a court would have to determine that ERISA was intended to create a large legal vacuum relieving employers from its negligent actions against its employees. Nothing in ERISA requires such an unreasonable result. Instead, petitioners claim against Pharmacia for its negligence in misleading Otero which caused him serious physical and emotional damages. This is the kind of "run of the mill" claims that the Supreme Court has recognized are properly the subject of state regulation. Puerto Rico's article 1802 is the only remedy petitioners have to obtain compensatory damages for claims that do not relate to the payment of benefits under the SPP.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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(any footnotes follow end of each document)

No. 05-2373
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBUR OTERO CARRASQUILLO, MARIA T. NEGRON CEDENO and the Conjugal Partnership formed between them AND JENNIFER OTERO M. NEGRON,
Plaintiffs, Appellants,

v.

PHARMACIA CORPORATION; PFIZER PHARMACEUTICALS; ZAIDA SANABRIA in her official and personal capacity; COMPANIES X, Y, Z, JANE DOE AND JOHN DOE,
Defendants, Appellees.

October 6, 2006, Decided

COUNSEL: Vilma M. Dapena Rodriguez for appellants.

Carl Schuster, with whom Lourdes C. Hernandez-Venegas, Maria Santiago-Ramos and Schuster & Aguilo LLP were on brief, for appellees.

JUDGES: Before Lynch and Howard, Circuit Judges, and Stafford, * Senior District Judge.

OPINION BY: HOWARD

OPINION: HOWARD, Circuit Judge. Robur Otero Carrasquillo brought an action in the Puerto Rico District Court against his former employer, Pharmacia Corporation,[1] his former supervisor, Zaida Sanabria, and unnamed administrators and fiduciaries of Pharmacia's separation benefits plan. At its core, the complaint alleges that Pharmacia violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., and Article 1802 of the Puerto Rico Civil Code by improperly denying Otero severance benefits after he left his employment with the company. The district court granted the defendants' motion for summary judgment, but assessed civil penalties against Pharmacia for failing to comply with ERISA's reporting and disclosure provision. We affirm.

I.

Otero worked as a research associate for Pharmacia at its Arecibo, Puerto Rico, fermentation plant from the late 1980's until November 2001. He was responsible for the fermentation of antibiotics. In February 2000, Pharmacia notified its employees that, effective June 2001, the Arecibo plant would close, and the fermentation process would be relocated to an affiliate facility in Kalamazoo, Michigan.[2] Because this relocation would result in the elimination of all jobs at the Arecibo plant, Pharmacia presented adversely affected employees with two options: (1) apply, between April 2000 and December 2001, for the company's Separation Package Plan ("Plan"), a supplement to worker unemployment benefits, or (2) continue to work for the company in a different position. In the interim, regardless of election, employees would remain active in their current positions until their services were no

longer needed or the Arecibo plant closed. At that time, those who had elected to remain with the company would be transferred to their newly assigned positions. For those who had elected to receive the separation benefits, the company would initiate an administrative process, designated the "Windows Exit Program," that would provide employees with 60 days to complete the necessary Plan paperwork.

During his last 18 months at Pharmacia, Otero was upset by several events that transpired at the plant. He alleges that Andres Lugo, the plant supervisor, incorrectly informed Otero that he could not apply for Plan benefits until the last fermentation of antibiotics had been completed, thereby inducing him to wait while other plant employees received job transfers or applied for separation benefits. Otero's repeated inquiries regarding his employment prospects were ignored or treated in a cursory manner. Receiving no prospective offers of employment, Otero eventually applied for various vacant positions with Pharmacia's remaining Puerto Rico branches, but these slots were given to more experienced applicants. Otero's difficulties were exacerbated in March 2001, when defendant Sanabria replaced Lugo as the plant supervisor. She was more critical of Otero's work than his previous supervisors, and gave him only an "average" employee review, well below the "excellent" reviews he had customarily received. Finally, in August 2001, Pharmacia offered Otero a position as a microbiologist. Although Pharmacia considered it a lateral transfer, Otero perceived it as a demotion.

On November 5, 2001, Otero declined the microbiologist position and requested separation benefits. Linda Diaz,

Pharmacia's Senior Director of Human Resources, immediately contacted the Plan administrator, who stated that Otero was no longer eligible to receive separation benefits. Although the Plan provided that terminated employees are generally eligible to receive such benefits, an exception existed for employees whose employment was discontinued due to a "transfer to an affiliated business," and who had been offered "a comparable position" within the company. Because Pharmacia interpreted the relocation of the fermentation process from Arecibo to Kalamazoo as a "transfer to an affiliated business," and Otero had been offered what it considered a "comparable position," the Plan administrator determined that Otero was not eligible to receive benefits.[3]

Immediately following the administrator's decision, Otero sought to personally deliver a letter to Pharmacia's Human Resources Manager, Carmen Calcano, to further inquire about his Plan eligibility and the basis for his denial. As he waited in Calcano's office, Otero suffered an emotional breakdown, collapsed to the floor, and injured his back. Because Otero required surgery and various other treatments for physical and psychological ailments, Otero qualified for the company's short-term disability program (under which he received 100% of his pre-disability salary), and ultimately, for the long-term disability program (under which he received upwards of 60% of his annual salary).

On July 5, 2002, Otero sent a letter to Pharmacia requesting information on a "Serious Health Condition" provision in the long-term disability plan, under which an injured employee could receive up to 100% of his annual salary. Receiving no response, Otero sent

several additional letters requesting information and copies of the long-term disability plan. On August 29, 2002, 55 days after his initial inquiry, Pharmacia responded with the requested materials. Included was a copy of the Summary of Material Modifications, a document (previously circulated to all Pharmacia employees in 1999) that outlined all the changes that had been made to the long-term disability plan. The form explained that the Serious Health Condition provision had been excised from the Plan. Unsatisfied, Otero continued to send letters requesting information on the Serious Health Condition provision, to which Pharmacia consistently replied that all requests had been adequately fulfilled by its August 29th response.

In July 2003, Otero filed suit against Pharmacia, Sanabria, and unnamed Plan administrators and fiduciaries, claiming that Pharmacia's denial of benefits violated ERISA, that Pharmacia's failure to produce Plan documents within the time period designated by ERISA's reporting and disclosure provision warranted the imposition of civil penalties, and that the actions of Lugo, Sanabria and others amounted to intentional infliction of emotional distress and fraudulent inducement under Commonwealth law. The district court granted the defendants' motion for summary judgment, concluding that Pharmacia's decision was not arbitrary and capricious and that Otero's supplemental Commonwealth law claims were preempted by ERISA. The court, however, found that Pharmacia had violated ERISA's reporting and disclosure provision, and accordingly ordered Pharmacia to pay Otero $ 2500 in civil penalties.[4] Otero now appeals.

II.

On appeal, Otero claims that Pharmacia's denial of his request for separation benefits was arbitrary and capricious, his supplemental state law claims are not preempted by ERISA, and the district court incorrectly calculated the civil penalties against Pharmacia.

A. The Benefits Decision

We begin with Otero's challenge to Pharmacia's denial of Plan benefits. It is undisputed that because the Plan reserved interpretative discretion to its administrators,[5] judicial review of Pharmacia's eligibility determination is limited to ascertaining whether the administrator's decision was arbitrary or capricious. *Leahy v. Raytheon Co.*, 315 F.3d 11, 15 (1st Cir. 2002). Thus, while we review summary judgment decisions de novo, *Matias-Correa v. Pfizer, Inc.*, 345 F.3d 7, 12 (1st Cir. 2003), where, as here, the underlying decision is subject to arbitrary and capricious review, we evaluate the district court's determination by asking "whether the aggregate evidence, viewed in a light most favorable to the non-moving party, could support a rational determination that the plan administrator acted arbitrarily in denying a claim for benefits," *Leahy*, 315 F.3d at 18. In other words, the question here is whether the district court correctly concluded that Pharmacia's interpretation of the Plan's language, and its ultimate benefits determination based upon that interpretation, were reasonable. *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19, 24 (1st Cir. 2003).

Pharmacia had determined that, because Otero's research associate position had been eliminated due to a

transfer of the job to an affiliated business, and because Otero was offered a comparable position as a microbiologist, he was not eligible to receive separation benefits. Otero argues that, according to the Plan, an employee whose job elimination results from a transfer to an affiliated business is only ineligible to receive benefits when the transfer is a product of the total or partial sale of the company. The eligibility provision that Otero cites provides, in relevant part, that:

benefits under the Plan shall not be provided to any Employee [whose] employment termination is due to . . . (6) his or her transfer to an affiliate company or its transfer due to the total or partial sale of the Company, either by the sale of its stocks or assets in which the Employee is offered a "Similar Position."

(Emphasis added). Since no sale precipitated the transfer of his job, Otero argues, this exception to benefits eligibility is inapplicable.

We disagree. Otero's argument relies on an inoperative version of the Plan. Otero's proffered language comes from a certified translation of a Spanish language document that had been circulated to employees at the Puerto Rico plant and was itself a translation of the original English language Plan. But the Spanish language translation explicitly stated on its front page that any terminological discrepancy between it and the original English language version would be resolved in accordance with the terms of the original Plan, and that copies of the original English language Plan would be made available at Human Resources. Thus, the original English language Plan is the controlling document. Because the original Plan does not require that the

transfer of the job be "due to" a sale of the company for the ineligibility provision to be triggered, Otero's argument fails.[6] Under the controlling Plan language, we see no basis to deem unreasonable Pharmacia's interpretation that an employee is ineligible to receive separation benefits when his job is eliminated due to either a transfer to an affiliated business or a total or partial sale of the company, and he is offered a comparable position with the company.[7]

Otero also argues that Pharmacia acted unreasonably by designating the move of the fermentation process from Arecibo to Kalamazoo as a "transfer to an affiliate business." In Otero's view, the move to the Kalamazoo facility could not be a "transfer" because that facility already operated a fermentation plant.

Where, as here, a term is not defined by the benefits plan, we give it "an ordinary and popular" reading "as would a [person] of average intelligence and experience." *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997); *Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 850 (6th Cir. 2006); see also 29 U.S.C. § 1022 ("A summary plan description of any employee benefit plan . . . shall be written in a manner calculated to be understood by the average plan participant . . . ."). The term "transfer" is commonly defined as "to convey from one person, place, or situation to another." Merriam-Webster's Collegiate Dictionary 1249 (10th ed. 2001). That the Kalamazoo facility may have already maintained a fermentation plant is not by itself inconsistent with this definition. Otero has presented no evidence that Pharmacia failed to convey some level of capacity from Arecibo to Kalamazoo. Indeed, the record suggests that Pharmacia

conveyed the function of the Arecibo plant to Kalamazoo to save on electricity costs. Accordingly, Pharmacia's interpretation was not unreasonable.

Finally, Otero argues that Pharmacia's denial of benefits was arbitrary and capricious because the positions of microbiologist and research associate are not "comparable." The Plan defines "Comparable Position" as:

employment with the Company or a successor employer in which the individual's level of responsibilities is substantially similar, as determined by the Company, to the individual's immediately prior position with the Company, requiring similar skill levels and offering similar pay (within 10%) and in which the Employee is not asked to move his or her principal business location more than 50 miles.

Otero concedes that the positions pay identical salaries, are performed within the same principal business location, and require the same educational background and basic skill levels. Nevertheless, he contends that the level of responsibilities of a microbiologist are not "substantially similar" to those of a research associate. Otero argues that a microbiologist has less substantial supervisory responsibilities, is not on call 24 hours a day, and has no office, cellular phone or beeper. The district court was unpersuaded, finding that the positions were comparable because Otero's qualifications fulfilled the requirements of both jobs.

While the positions' respective levels of responsibility are not identical, the Plan only requires that they be "substantially similar as determined by the Company."

Employing the company's traditional methodology for comparing two positions, Pharmacia found that, based on job descriptions, job requirements, salary, educational requirements and banding (the company's general method for systematizing position responsibilities), the positions of research associate and microbiologist were in fact comparable.

Otero states that as a microbiologist he would no longer be "producing millions in money for [the company]" as he had before, and that he would no longer be responsible for highly valuable company products and equipment. Statements at this level of abstraction, however, do not establish that the administrator's decision was arbitrary. See *Liston*, 330 F.3d at 25 (holding that the appellant's claim that she was "no longer responsible for developing and implementing growth and service strategies as well as piloting new work processes" was too abstract to stand as proof of "diminished responsibility" under the company's employee benefits plan, and therefore was not enough to make the company's denial of benefits arbitrary and capricious). Nor do Otero's more concrete arguments -- that the microbiologist is not on call, and has no office, cellular phone or beeper -- suffice to negate the otherwise substantially similar level of responsibilities, benefits and qualifications of the positions. In light of the broad interpretive discretion that Pharmacia reserved to itself, see supra note 5, we cannot say that its determination was arbitrary and capricious.

B. Preemption

We next turn to the district court's finding that Otero's state law claims are preempted by ERISA, 29 U.S.C. §

1144(a). In light of ERISA's goal to promote uniformity in the nationwide regulation of employee benefit plans, Congress designed the statute to supersede "any and all State [causes of action] insofar as they may now or hereafter relate to any employee benefit plan." Id. (emphasis added). The Supreme Court has identified two instances where a state cause of action relates to an employee benefit plan: where the cause of action requires "the court's inquiry [to] be directed to the plan," or where it conflicts directly with ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140-42, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Because the resolution of Otero's Commonwealth law claims for fraudulent inducement and intentional infliction of emotional distress would require analysis of the Plan, the district court correctly concluded that they are preempted.

In his complaint, Otero alleges that Pharmacia fraudulently induced him to continue his employment at the Arecibo plant by incorrectly informing him that he could not apply for severance benefits until all fermentation at Arecibo was completed, changing the benefits application deadline without informing him, and falsely promising him a comparable position at the company whenever he expressed concern for his job security. To determine whether these acts constitute fraudulent inducement, the district court would have to consult the severance plan to identify the application dates and the administrative process for determining and informing the employees of such dates. Additionally, to determine whether Pharmacia's promises of comparable employment were fraudulent, the court would have to consult the Plan to determine whether the offered microbiologist position was

"comparable" to his prior job as a research associate. Because the court's inquiry would necessarily "be directed to the Plan," the court was correct to dismiss the fraudulent inducement claims. See *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 794 (1st Cir. 1995) (holding that plaintiff's misrepresentation claim was preempted by ERISA because the computation of damages would require reference to the severance plan).

Otero's claim for intentional infliction of emotional distress is similarly unavailing. The factual basis supporting his emotional distress claim is simply a reiteration of the facts supporting his fraudulent inducement claims. Thus, "because the emotional distress claim obviously piggybacks on the facts underlying the [fraudulent inducement] claim, which [is] preempted, the emotional distress claim, too, is preempted." *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 7 n.9 (1st Cir. 1999).

C. Civil Penalties

Finally, Otero appeals the district court's method for calculating the civil penalties owed by Pharmacia for violating ERISA's reporting and disclosure provision. See 29 U.S.C. § 1132(c) (providing that any administrator who fails, within 30 days, "to comply with a request for any information which such administrator is required" to furnish, "may in the court's discretion be personally liable . . . in the amount of up to $ 100 a day from the date of such failure"). Finding that Pharmacia provided all the necessary materials 55 days after Otero's July 5th inquiry, the district court determined that Pharmacia's reply was 25 days late. See id. By

assessing the maximum discretionary penalty of $ 100 a day, the court calculated an award of $ 2500 in civil penalties. We review the court's determination for abuse of discretion. *Sullivan v. Raytheon Co.*, 262 F.3d 41, 52 (1st Cir. 2001).

Otero has presented nothing that causes us to question the district court's calculation. He argues that neither Pharmacia's August 29th response nor any of its subsequent correspondence contained information regarding the "Serious Health Condition" provision about which he requested information. But Pharmacia's August 29th correspondence fully explained that the "Serious Health Condition" provision was no longer in effect. Pharmacia was not obligated to provide any further explanation regarding an inactive provision. See *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 903 (7th Cir. 1999).

III.

For the foregoing reasons, the judgment of the district court is affirmed.

---------- Footnotes ----------

* Of the Northern District of Florida, sitting by designation.

n1 Pharmacia has since become a subsidiary of Pfizer, Inc.

n2 The facility at Kalamazoo was owned and operated by Pharmacia's parent company, Pharmacia & Upjohn.

n3 Sanabria initially told Otero that he was too late to receive Plan benefits because the administrative window had closed. Otero argues that, because Linda Diaz failed to inform him of the "Windows Exit Program," the defendants breached their fiduciary duties under ERISA. See 29 U.S.C. § 1104. But, as the district court correctly recognized, although there was some initial confusion in response to Otero's request, the Windows Exit Program was nothing more than an administrative tool providing employees with notice of their termination date so that they would have time to prepare the necessary paperwork. It had no bearing on Pharmacia's substantive benefits decisions.

n4 The district court also granted summary judgment for the defendants on Otero's additional claims of invasion of privacy and violation of ERISA's notice provision for failure to notify him of amendments to the long-term disability plan. Otero has not appealed these rulings.

n5 The relevant provision of the Plan provides that:

The company or its delegate will determine, in its or their sole discretion, the eligibility of each terminated Employee to participate in the Plan, the amount of Benefits to which a terminated Employee is entitled, and the manner and time of payment of the Benefits . . . . Any decisions, actions or interpretations to be made under the Plan by [Pharmacia] . . . shall be made in its respective sole discretion, not in any fiduciary capacity and need not be uniformly applied to similarly situated individuals and shall be final, binding and conclusive upon all parties.

n6 The eligibility provision of the original Plan provides:

The Company shall grant Benefits to any Terminated Employee whose services are terminated by reason of Job Elimination . . . . Notwithstanding anything herein to the contrary, a Terminated Employee will not [receive separation benefits] if his or her employment is discontinued due to [inter alia] . . . a transfer to an affiliated business, the sale of Pharmacia & Upjohn, Inc. or any portion thereof, either through a sale or exchange of stock or assets, or the outsourcing of a division, department, business unit or function where the employee has been offered a comparable position with the Company or the new employer.

n7 Additionally, there is a presumption that judicial review is limited to the evidentiary record presented to the administrator. See *Liston*, 330 F.3d at 23-24. Because the Plan administrator was located in the mainland United States, and the original English language Plan was the controlling version, we presume that it was the version that informed the administrator's decision. Otero has not presented any basis to believe otherwise, nor has he presented any argument for why we should consider the Spanish language version the controlling document.

Civil No. 03-1651 (JAF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBUR OTERO CARRASQUILLO, MARIA T. NEGRON CEDENO, and JENNIFER M. OTERO NEGRON,
Plaintiffs,

v.

PHARMACIA, et al.,
Defendants.

August 15, 2005, Decided

COUNSEL: For Robur Otero-Carrasquillo, Plaintiff: Vilma M. Dapena-Rodriguez, Vilma Maria Dapena Law Office, Bayamon, PR.

For Maria T. Negron-Cedeno, Plaintiff: Vilma M. Dapena-Rodriguez, Vilma Maria Dapena Law Office, Bayamon, PR.

For Conjugal Partnership Otero-Negron, Plaintiff: Vilma M. Dapena-Rodriguez, Vilma Maria Dapena Law Office, Bayamon, PR.

For Jennifer M. Otero-Negron, Plaintiff: Vilma M. Dapena-Rodriguez, Vilma Maria Dapena Law Office, Bayamon, PR.

For Pharmacia, Defendant: Carl E. Schuster, Lourdes C. Hernandez-Venegas, Maria L. Santiago-Ramos,

Schuster Usera & Aguilo LLP, Schuster Usera & Aguilo LLP, San Juan, PR.

For Pfizer Pharmaceuticals, Defendant: Carl E. Schuster, Lourdes C. Hernandez-Venegas, Maria L. Santiago-Ramos, Schuster Usera & Aguilo LLP, Schuster Usera & Aguilo LLP, San Juan, PR.

For Zaida Sanabria, Defendant: Carl E. Schuster, Lourdes C. Hernandez-Venegas, Maria L. Santiago-Ramos, Schuster Usera & Aguilo LLP, Schuster Usera & Aguilo LLP, San Juan, PR.

JUDGES: JOSE ANTONIO FUSTE, Chief U. S. District Judge.

OPINION BY: JOSE ANTONIO FUSTE

OPINION:

OPINION AND ORDER

Plaintiffs, Robur Otero Carrasquillo, Maria T. Negron Cedeno, their conjugal partnership, and their daughter, Jennifer Marie Otero Negron, bring the present action against Defendants, Pharmacia (incorrectly identified both as Pharmacia Corporation and Pfizer Pharmaceuticals) ("Pharmacia"); Zaida Sanabria in her official and personal capacities; Companies X, Y and Z; and Jane Doe and John Doe, alleging violations of the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § § 1001-1461. (1999 & Supp. 2005)* and Article 1802 of the Puerto Rico Civil Code, *31 L.P.R.A. § § 5141* (1991 & Supp. 2001). Docket Document No. 1.

On January 1, 2005, Defendants Pharmacia and Sanabria moved for summary judgment. Docket Document No. 28. Plaintiffs opposed the motion on February 25. Docket Document No. 37. Defendants filed a reply to Plaintiffs' opposition, Docket Document No. 67, and Plaintiffs filed a surreply. Docket Document No. 81.

I.

Relevant Factual and Procedural History

Unless otherwise indicated, we derive the following factual summary from the complaint and the statements of fact submitted by the parties in their summary judgment and opposition motions. Docket Document Nos. 1, 28, 38, 66, 82, 92.[1]

Plaintiff Robur Otero Carrasquillo ("Plaintiff") is a resident of Bayamon, Puerto Rico. Plaintiff began working for Defendant Pharmacia on June 4, 1973, and was employed as a Research Associate at Defendant Pharmacia's Arecibo plant from the late 1980's until the end of his employment in November 2001.

Plaintiff Maria Teresa Negron Cedeno, Plaintiff's wife, is a resident of Bayamon, Puerto Rico.

Plaintiff Jennifer Marie Otero Negron is a resident of Bayamon, Puerto Rico, and is the daughter of Plaintiff and Plaintiff Negron.

Defendant Pharmacia is a corporation organized and existing under the laws of the State of Delaware.

Defendants X, Y, and Z are unnamed entities, administrators, plan sponsors, and fiduciaries that participated in the alleged misconduct and/or issued

insurance policies that cover the damages claims in the present lawsuit.

Defendant Zaida Sanabria was Plaintiff's direct supervisor at Pharmacia in the Fermentation Plant during the final seven months of Plaintiff's employment.

Defendants Jane Doe and John Doe include unnamed medical personnel, independent contractors, and employees who directly or indirectly contributed, participated, and/or assisted in the alleged actions. In February 2000, Defendant Pharmacia announced the closing of the fermentation plant in Arecibo, Puerto Rico. Defendant Pharmacia always maintained a Separation Plan Package ("SPP") for its employees. The plan supplemented unemployment benefits for employees who lost their jobs due to job elimination, job restructuring, or non-performance. During a meeting for fermentation employees in September 2000, Linda Diaz, Senior Director of Human Resources for Defendant Pharmacia in Puerto Rico, informed the affected employees that they had two options: (1) apply for the SPP between April 19, 2000 and December 31, 2001; or (2) continue with the company in a different position.

In February 2001, all fermentation plant employees received a Spanish translation of the summary plan description of the SPP ("SPD"), which outlined in layman's terms the general contours of the SPP. According to the SPD, fermentation plant employees would be granted SPP benefits if they did not receive a "comparable" position within the company.

Plaintiff sought a comparable position with Defendant Pharmacia rather than the SPP benefits.

Plaintiff consulted several individuals within the company, but never received a clear answer as to what kind of job he would receive or when the position would become available.

During the following months, Plaintiff was upset by a number of events within the plant. The company denied Plaintiff's request to attend a seminar in St. Louis, Missouri. His new supervisor, Defendant Sanabria, was more critical than previous supervisors of his work product and made frequent comments that Plaintiff perceived as unprofessional, derogatory or dismissive. Plaintiff also witnessed his fermentation plant co-workers receiving their new assignments long before he received his new assignment.

On August 27, 2001, Plaintiff received a designation letter indicating that effective January 2, 2002, he would be assigned to the Quality Control Microbiology Laboratories as a Microbiologist III. He was instructed that due to business needs and the closing of the Fermentation Area, he was to continue in his then-current position until the end of December 2001.

Because Plaintiff perceived the new position as a demotion, on November 5, 2001, Plaintiff handed a letter - dated October 31, 2001 - to Defendant Sanabria indicating that "after months of extensive evaluation, financial planning, and also due to personal reasons" and in light of "many unpredictable situations," he had decided to change his "original decision regarding [his] future with Pharmacia" and accept the SPP. Docket Document No. 28, Exh. 22.

Prior to receiving Plaintiff's letter, neither Diaz nor Defendant Sanabria were aware of Plaintiff's intention to accept the SPP. Diaz immediately contacted Julie

Uebler, who was Diaz' SPP contact at Defendant Pharmacia's Corporate offices. Uebler said that since Plaintiff had already been assigned a comparable position, he was no longer SPP-eligible. Diaz conveyed this message to Defendant Sanabria, who conveyed it to Plaintiff on November 12, 2001.

Plaintiff then prepared another letter directed to Carmen Calcano, Human Resources Manager, further inquiring about his SPP eligibility and questioning Uebler's decision. As he delivered the letter to Calcano's assistant on November 12, 2001, he collapsed. After regaining consciousness, he spoke with Calcano for approximately two hours in her office regarding his future with the company. He returned to work the next day, November 13, 2001, but it was Plaintiff's last day of active employment with Defendant Pharmacia. Subsequently, he was admitted to the hospital for a back operation, and was hospitalized for several weeks.

From December 2001 until May 2002, Plaintiff received salary continuation benefits pursuant to Defendant Pharmacia's short-term disability ("STD") plan, whereby he received 100% of his annual salary. As of June 2002, Plaintiff began receiving long-term disability ("LTD") benefits, which amounted to 60% of his annual salary.

On June 8, 2003, Plaintiffs filed the present complaint. Docket Document No. 1. Defendant Pharmacia filed a summary judgment motion on January 19, 2005, arguing that their handling of the SPP with regard to Plaintiff did not violate ERISA, that the Commonwealth claims of breach of fiduciary duty, fraudulent inducement, and negligent/intentional infliction of emotional distress are preempted by

ERISA, and, finally, that the invasion of privacy claim should be dismissed. Docket Document No. 28.[2]

II.

Motion for Summary Judgment Standard under *Rule 56(c)*

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c).* A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. *Calero-Cerezo v. United States Dep.'t of Justice, 355 F.3d 6, 19 (1st Cir. 2004).*

The moving party carries the burden of establishing that there is no genuine issue as to any material fact, though the burden "may be discharged by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* The burden has two components: (1) an initial burden of production that shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion that always remains on the moving party. See *id. at 331.*

The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *FED. R. CIV. P. 56(e).* Summary judgment exists "to pierce the boilerplate of

the pleadings and assess the proof in order to determine the need for trial." *Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir. 2004)* (citing *Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992)).*

III.

Analysis

Defendant Pharmacia first argues that it complied with ERISA's standards, meriting dismissal of Plaintiff's ERISA claims. Defendant then argues that ERISA preempts the Commonwealth law causes of action. As to the federal claims, with one small exception, we agree that Defendant Pharmacia did not violate ERISA. With one further exception, we also agree that Plaintiff's Commonwealth law claims are preempted by ERISA.

A. ERISA Claims

"ERISA is a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510, 68 L. Ed. 2d 402, 101 S. Ct. 1895 (1981)* (quoting *Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361, 64 L. Ed. 2d 354, 100 S. Ct. 1723 (1980)).* Congress' intent was to ensure that if a worker had been promised a defined pension benefit upon retirement and had fulfilled the conditions required to obtain a vested benefit, the worker would actually receive it. *Nachman, 446 U.S. at 375.* ERISA controls the administration of benefit plans, see *29 U.S.C. § 1001(b)*, by imposing reporting and disclosure mandates, see *29 U.S.C. § § 1021-1031*, participation and vesting requirements, see *29 U.S.C. §*

§ 1051-1061, funding standards, see *29 U.S.C. § § 1081-1086*, and fiduciary responsibilities for plan administrators, see *29 U.S.C. § § 1101-1114*. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 651, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995)*. *Section 1132(a)(1)(B)* establishes a cause of action for plan participants and beneficiaries, allowing for the recovery of benefits due under the terms of the plan, the enforcement of rights under the terms of the plan, or the clarification of rights to future benefits under the plan. See *29 U.S.C. § 1132(a) (1) (B)*.

1. ERISA's Standard of Review for Denial of Benefits

The Supreme Court has held that "a denial of benefits challenged under *§ 1132(a) (1) (B)* is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989)*. If the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan, the denial of benefits is reviewed under an "arbitrary and capricious" standard. See *Wright v. R.R. Donnelley & Sons Co. Group, 402 F.3d 67, 74 (1st Cir. 2005)*; *Fenton v. John Hancock Mutual Life Ins. Co., 400 F.3d 83, 90-91 (1st Cir. 2005)*; *Matias-Correa v. Pfizer, Inc., 345 F.3d, 7, 11 (1st Cir. 2003)*.

The arbitrary and capricious standard is "functionally equivalent to the abuse of discretion standard." *Wright, 402 F.3d at 74 n.3*. Accordingly, "a

fiduciary's interpretation of a plan will not be disturbed if reasonable." *Terry v. Bayer Corp., 145 F.3d 28, 40 (1st Cir. 1998).*

2. ERISA Claim for Denial of SPP Benefits

When formulating the standard of review we must determine whether the SPP expressly granted discretionary authority to the plan administrator. See *Terry, 145 F.3d at 36.* The SPP states in pertinent part:

> Section 8.03 Discretion. The Company or its delegate will determine, in its or their sole discretion the eligibility of each terminated Employee to participate in the Plan, the amount of Benefits to which a terminated Employee is entitled, and the manner and time of payment of the Benefits . . . . Any decisions, actions or interpretations to be made under the Plan by P&U or the Company, or the Administrative Committee acting on behalf of the Company, shall be made in its respective sole discretion, not in any fiduciary capacity and need not be uniformly applied to similarly situated individuals and shall be final, binding and conclusive upon the parties.

Docket Document No. 28, Exh. 10. The terms of the SPP clearly grant discretionary authority to Defendant Pharmacia or its delegate. As there is no evidence that anyone other than Defendant Pharmacia or its delegate made SPP determinations, we review all of Defendant Pharmacia's Plan determinations under the arbitrary and capricious standard.[3] *Wright, 402 F.3d at 74.*

Plaintiff raised several arguments to support his complaint that Defendant Pharmacia's interpretation and application of the SPP was arbitrary and capricious. Docket Document No. 1. In its motion for summary judgment, Defendant Pharmacia addresses each of these arguments, contending that none of their decisions were unreasonable, and, therefore, Plaintiff's ERISA claims merit dismissal. Docket Documents Nos. 29, 67.

a. "Comparable Position" Determination Per the SPP

Defendant Pharmacia first argues that it acted within its discretionary authority in determining a "comparable position" for Plaintiff. Docket Document No. 29. Plaintiff counters that the comparable position did not have "a level of responsibility that is substantially similar," and, therefore, was in violation of the SPP and ERISA. Docket Document No. 37.

As noted above, the SPP grants Defendant Pharmacia the discretionary authority to determine what constitutes a comparable position under the plan. Docket Document No. 28, Exh. 10. Section 2.06 defines "comparable position" as: (1) "the individual's level of responsibilities is substantially similar, as *determined by the Company*, to the individual's immediately prior position with the *Company*"; (2) "requiring similar skill levels and offering similar pay (within 10%)"; and (3) "the Employee is not asked to move his or her principal business location more than 50 miles." Id. (emphasis added). The SPD, which was provided to all affected employees, also states that Defendant Pharmacia has discretionary authority in this regard. Docket Document No. 46, Exh. 10 ("[A] position shall be

considered as a 'Similar Position' if it is an employment within the Company . . . where the Employee has (1) a level of responsibility that is substantially similar, as *determined by the Company* . . . .") (emphasis added).

Plaintiff accepts that the comparable position satisfied (2) and (3) of the SPP requirements. Docket Document No. 37. Plaintiff's only contention is that the comparable position of Microbiologist III was essentially a demotion because it lacked the prestige of his prior position. Docket Document No. 38 ("He was well aware that the position was the equivalent of a demotion.").

It is the hallmark of arbitrary and capricious review, however, that a court does not substitute its judgment for that of the decision-maker. *Terry, 145 F.3d at 40.* Even if we were inclined to agree with Plaintiff that after twenty-nine years of service to Defendant Pharmacia he deserved a more prestigious position, we would not be at liberty to disturb a discretionary decision that is neither arbitrary nor capricious. Plaintiff had a bachelor's degree in biology, worked for the company for twenty-nine years, and received generally excellent reviews of his work during that time. Docket Document No. 1. As such, his resume fits squarely with the "comparable position" of Microbiologist III to which he was assigned. Docket Document No. 28, Exh. 19.

Not only did Plaintiff clearly fit the qualifications of the position to which he was assigned, but the employees who were assigned to the positions that he desired were as qualified, or more qualified, for those positions than Plaintiff. See Docket Document No. 28. Finding no evidence of any procedural irregularity and

noting that Plaintiff's qualifications fit the requirements of the Microbiologist III position, we conclude that Defendant Pharmacia's selection of a "comparable position" for Plaintiff was reasonable, and should not be disturbed. *Terry, 145 F.3d at 40.*

b. SPP Eligibility

Defendant Pharmacia next argues that because Plaintiff had been assigned to the comparable position of Microbiologist III, he was no longer eligible for the SPP benefits that he seeks. Docket Document Nos. 28, 67. To dispute Defendant Pharmacia's contention, and insist that Defendant Pharmacia's denial of benefits is contrary to ERISA, Plaintiff resorts to various inconsistent readings of the SPP that stubbornly refuse to accept the plan's plain terms. Docket Document Nos. 37, 81.

The second paragraph of the SPD, which outlined in layman terms SPP eligibility, reads, "The benefits under the Plan shall not be provided to any Employee whose employment termination is due to (1) his or her voluntary resignation from the Company . . . ." Docket Document No. 46, Exh. 10.[4] In its discretionary authority, Defendant Pharmacia determined that an employee who resigned from the company after being reassigned to a comparable position was not eligible for SPP benefits. Docket Document No. 67. After he had been assigned to the comparable position, Plaintiff decided to resign and opt for the SPP. Docket Document Nos. 28, 38. Defendant Pharmacia informed him that it was "too late" to receive SPP benefits because, upon receiving a comparable position, Plaintiff's decision to leave the company was a voluntary termination.[5] See id. Since this determination

was consistent with the terms of the SPD, Defendant Pharmacia's denial of SPP benefits was reasonable.

3. ERISA Claim for Denial of LTD Benefits

Finally, Defendant Pharmacia asseverates that Plaintiff's claim for LTD benefits is based upon an outdated employee benefits table in effect in 1997 that was amended in 1999. Docket Document No. 29. Defendant Pharmacia also asserts that it notified employees of plan alterations in a manner consistent with ERISA's regulations, thereby negating Plaintiff's ERISA claims. Docket Document No. 67. Plaintiff counters that he "was not notified as to any changes in the LTD program nor information regarding the classification of a 'serious health condition' in which he would have received 100% of his salary and not 60%." Docket Document No. 38. Plaintiff further submits that he consistently asked for the plan documents and that these requests were denied. Docket Document No. 1.

a. Failure to Notify

When a company modifies its plan, ERISA's notice requirements are "quite loose." *Dall v. Chinet Co., 33 F. Supp. 2d 26, 33 (D. Me. 1998).* "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78, 131 L. Ed. 2d 94, 115 S. Ct. 1223 (1995).* An ERISA plan administrator must simply furnish all participants with a summary of the material modifications made to a plan no later than 210 days after the end of the year wherein the changes were to go into effect. *29 U.S.C. § 1024(b) (1).*

On October 21, 1999, two months before the effective date of the LTD benefits amendment,

Defendant Pharmacia informed plan participants of the relevant amendment to the plan via a two-page letter written in the Spanish language. Docket Document No. 85, Exh. 15. Effective January 1, 2000, benefits under the LTD plan were adjusted to 60% of the employee's monthly salary. Id.

Plaintiff alleges that he never received this letter. Docket Document No. 81. Notwithstanding Plaintiff's allegations to the contrary, there is a widely held presumption that an addressee received a properly addressed and stamped letter that was mailed in a timely fashion. See, e.g., *Mercado-Garcia v. Ponce Federal Bank, 979 F.2d 890, 895 n.4 (1st Cir. 1992).* There is no evidence that the letter was returned to Defendant Pharmacia nor is there any evidence that the letter was improperly addressed. Thus, Plaintiff has provided no evidence to rebut the presumption that Defendant Pharmacia fulfilled its fiduciary duty. Accordingly, the application of the LTD amendments to Plaintiff do not violate ERISA.

b. Failure to Comply with Plaintiff's Request for Full Plan

Plaintiff also argues that he sent over ten letters to Defendant Pharmacia in an attempt to obtain the information regarding his LTD benefits and that these requests were routinely denied. Docket Document No. 37. According to Plaintiff, "There is not one letter that [sic] Linda Diaz addresses these specific inquiries and she even refused to submit to the Plaintiffs the SPD of the disability plan." Id. Defendant Pharmacia replies that a summary of material modifications ("SMM") was provided to Plaintiff on October 21, 1999, explaining relevant changes to the LTD. Docket Document No. 67.

Defendant Pharmacia further contends that the request for the SPD was unreasonable, since an updated SPD is only prepared five years from the date of effectiveness of the changes to the disability plan, consistent with the requirements of ERISA. Docket Document No. 67 (citing *29 U.S.C. § 1024(b)(1)* ("The administrator shall furnish each participant . . . every fifth year . . . an updated summary plan description. . . .")).

A plan participant who requests that the plan administrator furnish him with information that should be provided automatically pursuant to *§ 1024(b) (1)* triggers *§ 1132(c)*, and an administrator has thirty days to respond. *29 U.S.C. § 1132(c)* (stating that an administrator who fails or refuses to comply with a request for "any information which such administrator is required . . . to furnish" to a participant may be liable to such participant); *Crotty v. Cook, 121 F.3d 541, 548 (9th Cir. 1997)* (holding that if a participant requests information, he is automatically entitled to the civil enforcement penalty provided for by *29 U.S.C. § 1024(b)(1)*); *Brooks v. Metrica, Inc., 1 F. Supp. 2d 559, 564-65 (E.D. Va. 1998)* (holding that violation of ERISA disclosure *section 1024(b) (1)* results in penalties under *29 U.S.C. § 1132(c)*); *James v. New York City Dist. Council of Carpenters' Benefits Funds, 947 F.Supp. 622, 633 (E.D.N.Y. 1996)* (applying *29 U.S.C. § 1132(c)* penalty to administrator who failed to supply information required to be furnished to plan participants under *29 U.S.C. § 1024(b) (1)*). Thus, although the administrator has 210 days after the end of the plan year to automatically disclose to participants a change to the plan made in that year, if a participant to the plan specifically requests something he was entitled to receive automatically, then the civil penalty

provision, *§ 1132(c)*, applies and the administrator has thirty days to comply with the request. *Dall, 33 F. Supp. 2d at 34.*

First Circuit cases addressing the notice requirements involve a failure or outright refusal to furnish plan information. See, e.g., *Dall, 33 F. Supp. 2d at 34; Tucker v. General Motors Retirement Program, 949 F. Supp. 47, 55 (D. Mass. 1996).* None of these cases address Plaintiff's contention that Defendant Pharmacia failed to refurnish information.[6] Docket Document No. 37.

Section 1024(b)(1)'s provision requirements are not limited to requests for information that had not been previously provided. See *29 U.S.C. § 1024(b) (1).* Rather, *§ 1024(b)* generally speaks to full disclosure on the part of the plan administrator. See id. Specifically, *§ 1024(b)(4)* mandates that the plan administrator shall, "upon written request of any participant or beneficiary furnish a copy of the latest updated [SPD], and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." *29 U.S.C. § 1024(b) (4).*

It appears that Plaintiff first requested the information from Defendant Pharmacia in a letter dated July 5, 2002 and sent follow-up letters on July 24 and August 14. Docket Document No. 85, Exh. 15. It was not until a letter dated August 29, 2002, that Diaz addressed Plaintiff's concerns regarding the LTD benefits program, providing the pertinent SMM dated October 19, 2001 and all other requested documents. Docket Document No. 85, Exh. 17. Plaintiff submitted numerous follow-up letters, requesting further

explanation and repeatedly stating that he did not understand why his benefits had changed. See, e.g., Docket Document No. 79, Exh. 3 (stating, in a letter dated March 18, 2003, that he did not "understand the reason why the benefits indicated under the 'Employee Serious Health Condition' has not been applied, as described in the Pharmacia Employee Benefits Manual"). While Plaintiff alleges that Defendant Pharmacia was reticent to explain its benefits package, the initial August 29, 2002, reply letter includes the relevant SMM that clearly states, "If you continue disabled after 26 weeks on *Short Term Disability*, you may continue under Long Term Disability (before DLOA) for a period of 24 months." Docket Document No. 85, Exh. 17. The terms of that letter are clear and directly respond to Plaintiff's requests. Therefore, any delinquency regarding the duty to communicate the terms of the plan to Plaintiff under *§ 1024(b) (4)* was remedied by the letter dated August 29, 2002. More importantly, there is no allegation that Defendant's delinquency in any way prejudiced Plaintiff.

Section 1132(c) (1) requires plan administrators to furnish the requested information within thirty days after a *§ 1024(b)(4)* request. An administrator who fails to provide the material requested within thirty days may in the court's discretion be personally liable to the participant in the amount of up to $ 100 a day from the date of such failure or refusal. Id. Plaintiff's first request was made on July 5, 2002, and Defendant Pharmacia did not respond until August 29, 2002. Because fifty-five days elapsed, the reply was twenty-five days late. Because Plaintiff clearly requested the SMM and other relevant documents and Defendant Pharmacia waited far too long to reply to Plaintiff's

obviously desperate requests, we exercise the discretion granted us under *§ 1132(c) (1)* to find Defendant Pharmacia liable to Plaintiff in the amount of $ 100 a day from the date of such failure. See *§ 1132(c) (1)*.

Therefore, consistent with *§ 1132(c) (1)*, judgment shall be entered for Plaintiff in the amount of $ 2,500.00. As for the remaining LTD-oriented ERISA claims, we grant Defendant Pharmacia's motion for summary judgment.

B. ERISA Preemption of Commonwealth Law Claims

Turning from the federal to the Commonwealth law claims, Defendant Pharmacia argues that Plaintiff's various Commonwealth law claims should be dismissed because they are preempted by ERISA. Docket Document Nos. 28, 67. Plaintiff counters that the Commonwealth law claims are distinct from the ERISA claims and, therefore, are not preempted. Docket Document Nos. 37, 81.

Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provide for appropriate remedies, sanctions, and ready access to the Federal courts." *AETNA Health Inc. V. Davila, 542 U.S. 200, 159 L. Ed. 2d 312, 124 S. Ct. 2488, 2495 (2004)* (quoting *29 U.S.C. § 1001(b)*). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive preemption provisions, see *29 U.S.C. § 1144*, which are intended to ensure that

employee benefit plan regulation would be "exclusively a federal concern." *Alessi, 451 U.S. at 523.*

ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." *Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, at 147, 87 L. Ed. 2d 96, 105 S. Ct. 3085* (internal quotation marks and citation omitted). This integrated enforcement mechanism, *29 U.S.C. § 1132(a)*, is a distinctive feature of ERISA, and essential to accomplish Congress purpose of creating a comprehensive statute for the regulation of employee benefit plans. Therefore, any Commonwealth-law cause of action that duplicates, supplements or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is, therefore, preempted. See *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54-56, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)*; see also *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143-45, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).*

The preemptive force of *ERISA § 502(a)* is still stronger. *ERISA § 502(a)(1)(B)* converts Commonwealth causes of action into federal ones for purposes of determining the propriety of removal. *AETNA, 124 S. Ct. at 2496.* Thus, the ERISA civil enforcement mechanism is one of those provisions with such "extraordinary pre-emptive power" that it "converts an ordinary commonwealth common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).*

ERISA provides for preemption of Commonwealth law causes of action "insofar as they may now or hereafter relate to any employee benefit plan." *29 U.S.C. § 1144(a) (1999 & Supp. 2004)*; *Carpenters Local Union No. 26 v. United States Fidelity & Guar. Co., 215 F.3d 136, 139 (1st Cir. 2000)*. We underscore the fact that "ERISA preempts state laws that relate to covered plans; it does not require that a state law establish such a plan, or expressly contemplate existing plans in order for preemption to apply." *Rosario-Cordero v. Crowley Towing & Transportation Co., 46 F.3d 120, 127 (1st Cir. 1995)*; see also *Vartanian v. Monsanto Co., 14 F.3d 697, 701 (1st Cir. 1994)* (holding that ERISA would preempt any state law that "'relates to' an employee benefit plan . . . if it has a connection with or references to such a plan") (quoting *Ingersoll-Rand, 498 U.S. at 139*).

"ERISA preemption analysis thus involves two central questions: (1) whether the plan at issue is an 'employee benefit plan' and (2) whether the cause of action 'relates to' this employee benefit plan." *McMahon v. Digital Equip. Corp., 162 F.3d 28, 36 (1st Cir. 1998)*. ERISA preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 19, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987)*. We proceed to consider Plaintiff's Commonwealth law claims under this framework.

1. Negligent/Intentional Infliction of Emotional Distress and Fraudulent Inducement/Concealment

The Plaintiff's first two Commonwealth law claims are for negligent and/or intentional infliction of

emotional distress and fraudulent inducement/concealment filed under *Article 1802 of the Puerto Rico Civil Code.* Docket Document No. 1. Defendant Pharmacia moves for summary judgment as to these claims arguing that the Commonwealth law claims necessarily require interpretation of the ERISA-covered plan and, therefore, are preempted by ERISA. Docket Document No. 67. Plaintiff barely counters this argument, merely stating that "there is not one single argument that establishes that the state law claim have [sic] anything to do with the entitlement [to] plaintiffs' ERISA benefits." Docket Document No. 81.

Article 1802 of the Puerto Rico Civil Code is a general provision, articulating the "obligation when damaged caused by fault or negligence."[7] *31 L.P.R.A. § 5141.* The mere fact that it is a general clause with no reference to employee benefit plans, however, does not exclude it from ERISA preemption. *Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 439 (1st Cir. 1996)* ("A court cannot conclude that a state law is one of general applicability, and as such is not preempted by ERISA, based on the form or label of the law . . . ."). "Absent precedent on a closely-related problem, the inquiry into whether a state law 'relates to' an ERISA plan or is merely 'tenuous, remote, or peripheral' requires a court to look at the facts of the particular case." *Id. at 439-40.*

In his complaint, Plaintiff repeatedly refers to the SPP in his cause of action for emotional distress. Docket Document No. 1. Plaintiff's allegations assert that "Defendants concealed to plaintiff that the SPP's deadline had been changed," that Codefendant Sanabria "failed to mention to plaintiff any changes to the SPP," and that Plaintiff's injuries were caused by a "complete

disregard of his [SPP] application and requests." Id. Plaintiff repeatedly refers to the SPP, and the basis of his negligent and/or intentional infliction of emotional distress claim turns upon Defendant Pharmacia's failures to be forthcoming about the SPP's contents. Id.

As the First Circuit held in Danca v. Private Health Care Systems, Inc., claims of negligent infliction of emotional distress under state law that necessarily implicate the administration of an employee benefit plan "indisputably create a threat of conflicting and inconsistent state and local regulation of the administration of ERISA plans." *185 F.3d 1, 7 (1st Cir. 1999)* (citing *New York State Conference of Blue Cross, 514 U.S. at 656-58*). If this type of claim were not preempted, a different standard would develop as to the appropriate behavior of the personnel responsible for the administration of the plan. See *Danca, 185 F.3d at 7.*

In order to resolve Plaintiff's emotional distress claim, we would have to determine Defendant Pharmacia's disclosure duties as created by ERISA. *29 U.S.C. § 1024(b)(1).* As discussed above, ERISA dictates the extent of these duties. See, supra, Part III.A.3.a. Any determination of Plaintiff's Commonwealth law claim, therefore, would require an interpretation of ERISA. As such, Plaintiff's claims clearly "relate to" ERISA, and are necessarily preempted. See *Danca, 185 F.3d at 7*; *McMahon, 162 F. 3d at 36.*

Turning to the fraudulent inducement/concealment claim, Plaintiff's cause of action similarly makes numerous references to the SPP, alleging that Defendant Pharmacia "fraudulently induced plaintiff to

continue working for the company's benefit . . . while changing behind the plaintiff's back the deadline set in the SPP for the benefits." Docket Document No. 1. The claim further states that "in essence, the SPP expiration date was altered by the company." Id. Finally, the complaint states that "Defendants made the representations knowing them to be false . . . with the intent to fraudulently induce plaintiff to rely on them by acceding to continue working for the corporation." Id.

Like the emotional distress claim, Plaintiff's statement of the fraud cause of action is based in large part upon Defendant Pharmacia's alleged noncompliance with the disclosure requirements of ERISA. See Docket Document No. 1; *29 U.S.C. § 1024(b) (1)*. In order to determine whether. Defendant Pharmacia's conduct was fraudulent, we would have to consider the degree to which it complied with ERISA's requirements. See *Danca, 185 F.3d at 7*; *McMahon, 162 F. 3d at 36*. As a result, we again conclude that Plaintiff's claims clearly "relate to" ERISA. Id.

Accordingly, ERISA preempts Plaintiff's Commonwealth law claims of negligent/intentional infliction of emotional distress and fraudulent inducement/concealment.

C. Supplemental Jurisdiction

The supplemental jurisdiction statute provides that "district courts may decline to exercise supplemental jurisdiction" when "the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)*. Because we grant Defendants' motion for summary judgment regarding the federal claims and

federal preemption, we decline to exercise supplemental jurisdiction over Plaintiffs' non-preempted Commonwealth law claim for invasion of privacy. See *Cannarozzi v. Fiumara, 371 F.3d 1, 7 (1st Cir. 2004)*. Plaintiffs are, of course, free to pursue that cause of action in the courts of Puerto Rico. *Figueroa v. Rivera, 147 F.3d 77, 83 (1st Cir. 1998)*.

IV.

Conclusion

In accordance with the foregoing, we exercise our discretionary authority under *§ 1132(c) (1)* and **ORDER** Defendant Pharmacia to pay Plaintiffs $ 2,500.00 for its failure to provide the requested documents within thirty days. We **GRANT** Defendant Pharmacia's motion for summary judgment on each of Plaintiffs' other claims, except the Commonwealth law claim for invasion of privacy. Plaintiffs' invasion of privacy claim is **DISMISSED WITHOUT PREJUDICE.** Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 15th day of August, 2005.

JOSE ANTONIO FUSTE
Chief U. S. District Judge

Footnotes

n1 We disregard the parties' Spanish-language exhibits. *Estades-Negroni v. Assocs. Corp. of N. Am., 359 F.3d 1, 2 (1st Cir. 2004)* (holding that non-English materials

submitted for review may not be considered during the pre-trial process or become part of the record).

n2 Sorting the facts of this case was a taxing affair. Local Rule 7.1(e) provides, "No memorandum of law in support of or in opposition to . . . a motion for summary judgment . . . shall not [sic] exceed twenty-five (25) pages)." P.R. LOCAL R. 7.1(e). We granted the parties leave to file motions in excess of the page limit, but both parties abused our generosity by submitting 70 and 114-page "statements of fact" along with repetitive, overlong motions and memoranda of law with snide, baiting, and irrelevant commentary. See, e.g., Docket Document Nos. 38, 66. Each submission could have been shorter through even routine editing and the omission of trivial arguments. In particular, Defendant Pharmacia's motion could have been shorter through the omission of condescending, insulting, and generally inappropriate language.

n3 Plaintiff contends that the plan determinations were not made by Defendant Pharmacia or its delegate, but rather by the Senior Human Resources Director, Linda Diaz. Docket Document No. 37. Since Diaz was not a delegate of Defendant Pharmacia's discretionary authority, Plaintiff argues that any determinations by Diaz should be analyzed according to a de novo standard of review. Id. Plaintiff's argument is plainly inconsistent, however, because if Diaz was not a delegate of the discretionary authority, as Plaintiff contends, then Diaz' "determinations," whatever they were, had no bearing on the denial of Plaintiff's benefits.

Furthermore, there is no evidence that Diaz made any SPP determinations. According to Defendant Pharmacia, Diaz merely relayed information provided to her by the corporate officer, Julie Uebler. Docket Document No. 28. Plaintiff disputes this claim, via hearsay objections that fail to comprehend the meaning of "hearsay." See Docket Document No. 38. The disputed deposition testimony provided by Diaz regards Diaz' personal knowledge and, therefore, is not hearsay. See Docket Document No. 28, Exh. 9. In the end, Plaintiff's assertion that Diaz was the decision maker is so rife with inconsistencies and illogical interpretations that it merits no consideration. See, e.g., id.

n4 The SPD provided to Plaintiff does not refer to Defendant Pharmacia's discretionary authority regarding the determination of SPP eligibility, Docket Document No. 46 Exh. 10, but we apply the arbitrary and capricious standard nonetheless. *Fenton v. John Hancock Mut. Life Ins. Co., 400 F.3d 83, 91* ("The silence of the summary plan description on the issue of the administrator's discretion does not create a direct conflict with any particular Plan provision and therefore does not warrant *de novo* review.").

n5 Plaintiff acknowledged that this justification had been fully explained to him in a letter dated July 5, 2002. Docket Document No. 85, Exh. 15 ("In the letter subscribed by Linda E. Diaz, dated December 12, 2001, she tells us that the reason why my husband was not able to join the Separation Benefits Plan is that he had been assigned to a position as a Microbiologist III . . . ."). Thus, Plaintiff's contention that the denial of benefits was due to the closing of the SPP "window" is inaccurate and irrelevant. Docket Document No. 37.

n6 Germane to this issue is Krohn v. Huron Memorial Hospital, wherein the plaintiff requested information regarding her eligibility for long-term disability benefits. *173 F.3d 542, 545 (6th Cir. 1999).* The defendant did not provide the requested documents, but argued that *§ 1132(c)* should not apply because it had already provided her with a summary plan description, an employee handbook, and an individual meeting with the plan administrator. *Id. at 550.* The Court rejected the defendant's argument, reasoning, "Providing a summary plan description several years before the request for information does not excuse the [defendant] from its duty to respond fully and accurately to later inquiries regarding benefits." Id. Accordingly, the Court held that provision of a summary plan description did not discharge or fulfill the fiduciary's obligation to provide complete material information upon the beneficiary's request. *Id. at 548* ("[The] duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful."). The reasoning and outcome of*Krohn* are distinguishable from the present case, however, because the fiduciary's failures in Krohn significantly impaired the beneficiary's ability to assert her rights. Id. In the present case, even if Defendant Pharmacia failed in its affirmative duty to inform the Plaintiff of the full contours of his LTD benefits, the failure had no effect on Plaintiff's eligibility for LTD benefits.

n7 The Code section, in its entirety, reads:

A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.

31 L.P.R.A. § 5141.

12/26/06

No. 05-2373

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBUR OTERO CARRASQUILLO et al
Plaintiffs, Appellants,

v.

PHARMACIA CORPORATION et al
Defendants, Appellees.

Boudin, Chief Judge, Torruella, Selya*, Lynch, Lipez, Howard, Circuit Judge, Stafford**, Senior District Judge.

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

---------- Footnotes ----------

*Judge X is recused and did not participate in the consdieration of this matter.

** Of the Northern District of Florida, sitting by designation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Procedural Due Process of Law Clause:

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 1022, "Summary Plan description" provides:

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. *The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.* A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in

accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; *the plan's requirements respecting eligibility for participation and benefits*; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the Records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this

title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C.§1133: Claims Procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the *specific reasons for such denial*, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1024 (b)(4) provides:

"The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."

29 U.S.C. 1132(C)(1) "Civil Enforcement" provides:

(c) Administrators refusal to supply requested information; penalty for failure to provide annual report

in complete form

(1) Any administrator

(A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021 (e)(1) of this title, or section 1021 (f) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

Article 1802 of the Puerto Rico tort's law, 31 Laws P.R. Ann. § 5141 states as follows:

A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.

(2)

No. 06-1294

FILED
MAY 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ROBUR OTERO CARRASQUILLO, MARÍA T. NEGRÓN CEDEÑO AND THE CONJUGAL PARTNERSHIP FORMED BETWEEN THEM AND JENNIFER OTERO M. NEGRÓN,
Petitioners,

v.

PHARMACIA CORPORATION; PFIZER PHARMACEUTICALS; ZAIDA SANABRIA IN HER OFFICIAL AND PERSONAL CAPACITY; COMPANIES X, Y, X, JANE DOE AND JOHN DOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Can a Circuit Court base its decision on appeal on issues not briefed by the parties, when the record below is sufficiently developed and grounds for the decision can be found in it?

II. Is there any conflict between the Circuits regarding conflicting language between an ERISA-covered plan document with its summary plan description (SPD) originally drafted in English, and an erroneous translation of said document into Spanish?

III. Is a Circuit Court correct in disregarding the Spanish translation of an SPD in favor of the English version of the plan and its SPD when the English language documents show the true intent of the drafter and application of the Spanish language translation of the SPD would result in an absence of uniform application of the plan across sites in different states?

IV. Are claims for damages for fraudulent inducement / fraudulent concealment and for intentional infliction of emotional distress preempted under ERISA where the claims are based on alleged actions which result in a participant's failure to obtain benefits under an ERISA-covered plan?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondents Pfizer Pharmaceuticals LLC and Zaida Sanabria state as follows:

1. All interested parties to this proceeding are identified in the caption.

2. Effective January 1, 2004, Pharmacia & Upjohn Caribe, Inc., incorrectly identified as both Pharmacia Corporation and Pfizer Pharmaceuticals ("Pharmacia"), became Pfizer Pharmaceuticals LLC. Pfizer Pharmaceuticals LLC is a limited liability company organized and existing under the laws of the state of Delaware. It is an indirect wholly owned subsidiary of Pfizer Inc,, a publicly held corporation whose stock is publicly traded in the New York Stock Exchange.

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STATEMENT OF THE CASE

A. Brief Procedural Background

On June 11, 2003, petitioners Robur Otero Carrasquillo ("Otero"), María T. Negrón Cedeño, the conjugal partnership formed between them and Jennifer Otero M. Negrón filed a complaint against respondents, alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., as well as supplemental claims for intentional/negligent infliction of emotional distress and fraudulent inducement/ fraudulent concealment under Article 1802 of the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, § 5141 ("Art. 1802"), and one claim for invasion of privacy under Puerto Rico's Constitution. Respondents filed their answer to the Complaint on January 7, 2004.

After prolonged discovery by both parties, on January 19, 2005, respondents filed a Motion for Summary Judgment. On February 25, 2005 petitioners filed their Opposition. Respondents filed their Reply on April 11, 2005. Petitioners filed a sur-reply on May 9, 2005.

On August 16, 2005, the District Court issued an Opinion and Order and a Judgment, whereby it dismissed petitioners' ERISA claim for benefits on its merits, as well as all of their state law claims on ERISA preemption grounds, except for their claim for invasion of privacy under the Puerto Rico Constitution. On the other hand, the District Court imposed a $2,500 penalty under ERISA against Pharmacia, for failure to timely provide petitioners with certain requested information.

On October 12, 2005, petitioners appealed before the United States Circuit Court of Appeals for the First Circuit ("First Circuit"). After the parties filed their respective briefs, on October 6, 2006, the First Circuit affirmed the District Court's Judgment. Petitioners requested a rehearing en banc, which was denied by the First Circuit on December 26, 2006. The instant petition ensued.

B. Factual Background

Otero worked for Pharmacia since 1973. Throughout his employment, Otero worked as a Microbiologist in the Fermentation Plant at the facility in Arecibo, Puerto Rico. His position title was Research Associate III.

On or about February 18, 2000, during a meeting with the Fermentation Plant employees, it was announced that, as a result of a Company business decision, the Fermentation Plant would close, *and that the fermentation process would be transferred to an affiliate's plant in Kalamazoo, Michigan.* Subsequently, frequent meetings were held with affected employees in connection with several related matters, including their future with the Company. During said meetings, employees were assured that the Company would identify and assign similar positions for all affected employees. The intention of the Company at that time was to provide all displaced employees with a position elsewhere on the Arecibo site. As part of these orientations, employees were also told that, even if they were assigned to other positions in the Company, they would remain in the Fermentation Area as long as their positions were needed. The newly assigned position would then remain reserved for the employee until his or her position at the Fermentation Area was eliminated.

At all times relevant to the instant claim, Pharmacia's parent Company, Pharmacia & Upjohn Company (hereinafter referred to as "Corporate"), sponsored a "Separation Payment Plan" ("SPP"). The purpose of said plan was "to alleviate in part or in full financial hardships which may be experienced by certain of those Employees of [Pharmacia & Upjohn], and certain of its affiliates. . . whose employment is terminated, where the termination is initiated by the Company. In essence, benefits under the Plan are intended to be supplemental unemployment benefits." SPP, Section 1.02. The amount of benefits was based on the employee's base pay at the time of his or her termination and his or her years of service.

Under the SPP, eligibility for benefits was reserved for employees "whose services are terminated by reason of Job Elimination, Job Restructuring, or Non-Performance". On the other hand, in its relevant part, the SPP provides that employees would not be considered to have been terminated by reason of a job elimination, job restructuring or non-performance, when their cease in employment was due to resignation or "a transfer to an affiliated business, the sale of Pharmacia & Upjohn, Inc. or any portion thereof, or the outsourcing of a division, department, business unit or function where the Employee has been offered a Comparable Position with the Company or the new employer". SPP, Section 3.1.

In light of the announcement of the impending closing of the Fermentation Plant, Pharmacia requested that Corporate apply the SPP to the Fermentation Plant's employees by treating the closing as a reorganization. This, inasmuch as Pharmacia interpreted it as such, since the fermentation process was being transferred to another legal entity. Indeed, during a meeting with Fermentation employees in September of 2000, they were informed that Corporate had decided to approve the extension of the SPP to the Fermentation Plant's closing, and were

provided highlights of the program. When the announcement was made, however, the summary plan description for the SPP had yet to be translated into Spanish. Therefore, the affected employees did not receive a copy of said document at that time.

On or about February, 2001, Otero, as well as all the Fermentation plant employees, received a Spanish translation of the summary plan description of the SPP (hereinafter referred to as "the Spanish translation of the SPD"). Just as the SPP defined the term "Comparable Position"[1], the SPD defined the term "Similar Position" as employment with the Company or the successor employer in which the employee has substantially similar level of responsibility, as determined by the Company, to that which he or she had in his or her former position with the Company, which requires the same level of skills and a similar compensation (within 10%), and whose work location is no more than 50 miles from the location of his or her former job. The determination as to what was a comparable or similar position was made by the Company, and specifically, Human Resources. The comparison of positions was based on job requirements, accountabilities, salary and banding, based on the job description of the position, also known as role profile of the position. In addition, the term "lateral movement" was defined as a movement that involves no change in salary, band or grade. The Company considered this synonymous with a similar or comparable position.

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[1] The SPP defines a "comparable position" as "employment with the Company or a successor employer in which the individual's level of responsibilities is substantially similar, as determined by the Company, to the individual's immediately prior position with the Company, requiring similar skill levels and offering similar pay (within 10%) and in which the Employee is not asked to move his or her principal business location more than 50 miles".

Inasmuch as the Company considered the transfer of the Fermentation operations to its affiliate in Kalamazoo a "transfer to an affiliated company of a part of the Company", under the terms of the SPP, Corporate interpreted the Plan to allow for benefits only when an employee was not offered a comparable position with the Company. Indeed, Fermentation employees were told that, if they were not interested in remaining employed with the Company, they should so indicate, and the Company would not "pursue getting them a comparable position". Therefore, as the positions at the Fermentation plant were eliminated, those who had a comparable position would be transferred to it, while those who did not have a comparable position would be "exited" from the Company.

When the time came to "exit" for an employee or a group of employees with SPP benefits because their position was no longer needed and they did not have a comparable position, the Company would contact Corporate in order for the exit process to be completed. Corporate would then "open a window", which was a time period of 60 days, ending on the employee's termination date. Therefore, the employee would be notified of his or her termination date 60 days in advance, and would then have said period to complete all necessary paperwork, which consisted of the execution of a release agreement which required a period of 21 or 45 days for the employee to consider the same, pursuant to the requirements set forth in the Older Workers' Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626. It must be noted that, contrary to petitioners' allegations, there is no such thing as a "windows program". A "window" is a commonly used business term to describe an *employer's* internal administrative process for exiting an employee, be it through retirement or separation. It has nothing to do with actual entitlement to benefits under any plan, but instead focuses on the process the Company follows, in its role as the *employer*, for an employee to be able to exit employment,

having completed all exit processes which, in this case, includes considering, signing and not revoking, a release agreement in exchange for payment of separation benefits, once the employee is, in fact, entitled to benefits under the plan.

Andrés Lugo, Otero's supervisor at the time, who was also a potential beneficiary of the SPP, received a copy of the summary plan description in February 2001, along with Otero. Upon receipt of said document, Lugo limited himself to reviewing the table of benefits. However, he did not read the document in detail, inasmuch as he was interested in remaining with the Company. Lugo was not a plan administrator or fiduciary, nor did he make any decisions whatsoever in connection with eligibility for benefits under the same. On the other hand, Zaida Sanabria also knew of the existence of the SPP, but was not familiar with its terms, and never saw the document. This, inasmuch as, at the time the Spanish translation was distributed, the group of employees that Sanabria was in charge of at that time were not interested in leaving the Company. Sanabria never saw the Spanish translation of the SPD. Sanabria also lacked any authority whatsoever over the SPP, nor over the process to determine eligibility for benefits under the same.

Sometime in mid-March, 2001, during a meeting held with the Fermentation employees, several movements in the area's management personnel were announced. As a result of these movements, Sanabria took over as Manager of the Fermentation area, in addition to her other assigned areas. She then became Otero's direct supervisor.

On June 20, 2001, Otero was informed that he had a guaranteed position as a Microbiologist III in the Quality Control Laboratories and, subsequently, it was announced that

he was to be included in the "headcount" for January 2, 2002, as Microbiologist III in the Quality Control area.

The job description/role profile for the Research Associate III and Microbiologist III have the same rating, in terms of band (both are Band B), educational requirements (both require, as a minimum, a Bachelor's Degree in Science and four (4) years of experience in the field, technical competencies, leadership and customer/human relationship skills and accountabilities, also known as "decision boundaries"). Therefore, the Company considered them to be "comparable positions". Notwithstanding, Otero avers that, at the time this announcement was made, *he* believed the assignment to said position to be a demotion. On August 27, 2001, during a staff meeting, Sanabria gave Otero a designation letter which confirmed that, effective January 2, 2002, he would be assigned to the Quality Control Microbiology Laboratories, as a Microbiologist III. He was also told that, due to business needs and the closing of the Fermentation Area, his current position would continue until the end of December, 2001.

Otero was not happy with his designation and, on November 5, 2001, he handed Sanabria a communication whereby he expressed that he wished to exit the Company with SPP benefits. This request was the first time that Sanabria became aware of Otero's interest in SPP benefits. According to Otero, at that time Sanabria expressed that she believed it was too late for him to request such benefits. Notwithstanding, Sanabria informed Linda Díaz, who was the main liaison with Corporate regarding the SPP, regarding this matter.

This was also the first time Díaz became aware of Otero's interest in obtaining SPP benefits. She, in turn, called Julie Uebler at Corporate, who was her contact for the SPP. She informed Uebler of Otero's request and, upon Uebler's inquiry,

Díaz informed her that Otero had been placed in what the Company understood was a comparable position. Based on this information, Uebler informed Díaz that Otero was not eligible for SPP benefits.

On November 6, 2001, Díaz informed Sanabria by email regarding the results of her conversation with Uebler. On November 9, 2001, as soon as Sanabria became aware of the email, she forwarded the same to Otero. On November 12, 2001, upon his arrival at work, Otero read Sanabria's emails regarding his SPP inquiry, which confirmed her initial expressions regarding the SPP benefits.

On that same afternoon, Otero went to the Company's Human Resources Offices to speak to the Human Resources Manager, Carmen Calcaño, regarding his SPP inquiry. Otero alleges that, when he attempted to deliver a letter he had drafted, he felt his hand begin to shake, fainted, and fell backwards, losing consciousness. Upon regaining consciousness, Otero decided to stay in Calcaño's office and speak to her regarding his inquiry. Calcaño indicated to Otero that he had applied for SPP benefits too late. On November 13, 2001, at Otero's request and after consulting Díaz, Calcaño confirmed to him that, in fact, he was too late to be eligible to receive SPP benefits.

November 13, 2001 was Otero's last day of active employment with the Company. Subsequently, he was admitted to the hospital for a back operation, was hospitalized for several weeks, and later began receiving long term disability (LTD) benefits. Otero is currently still receiving LTD benefits.

Petitioners' request for writ of certiorari is limited to four arguments[2], to wit: (1) that the First Circuit erred in affirming the District Court's decision on grounds not raised, or briefed by, either of the parties; (2) that the First Circuit erred in basing its decision on the SPP plan document and not on an erroneous Spanish translation of its SPD, thus creating an alleged conflict between Circuits; (3) that the First Circuit went against its own precedent when it avowed respondents' alleged articulation of different reasons for the denial of Otero's SPP benefits; and (4) that the First Circuit erred in determining that petitioners' claims for fraudulent inducement and intentional infliction of emotional distress were preempted by ERISA. As will be demonstrated below, however, Petitioners' position falters on all fronts. Therefore, Certiorari should not be granted by this Honorable Court.

CERTIORARI SHOULD NOT BE GRANTED

A. Standard for Granting Certiorari

"Review on a writ of certiorari is not a mater of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Petitioners have not presented any compelling reason for this Honorable Court to exercise its discretionary jurisdiction over their attempted appeal of the dismissal of their claims. Indeed, as will be demonstrated below, their key complaints, regarding

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[2] Petitioners make no mention in their submission before this Honorable Court regarding several arguments brought forth before the First Circuit Court of Appeals, to wit, the standard for reviewing Pharmacia's decision, as well as the amounts imposed by the District Court against Pharmacia for daily statutory penalties. Thus, these issues are not before this Honorable Court, and should be considered waived.

the basis for the First Circuit's decision, as well as the merits of their claims, were more than adequately addressed by the Courts below, and should not be disturbed by this Honorable Court.

B. The First Circuit did not go against this Honorable Court's decision in Singleton v. Wulff: the First Circuit's decision was based on a record that was sufficiently developed and grounds to support the decision are found in it.

Petitioners are entirely correct in that this Honorable Court has held that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 U.S. 106, 120 (1976). Notwithstanding, petitioners have misconstrued this Honorable Court's holding. At the outset, it must be noted that, in Wulff, this Honorable Court refused to establish that this "general rule" is set in stone:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. *We announce no general rule.* Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . ., or where "injustice might otherwise result". . . .

Singleton v. Wulff 428 U.S. at 121, quoting Turner v. City of Memphis, 369 U.S. 350 (1962) and Hormel v. Helvering, 312 U.S. 552 (1941). (Internal citations omitted).

Moreover, the set of procedural facts present in Wulff, upon which this Honorable Court made its holding, are clearly distinguishable from those of the instant case. In Wulff, the case was dismissed upon a pre-answer motion to dismiss. Therefore, there had been no answer to the complaint, scant discovery, and no opportunity for the parties to raise all issues they felt necessary, with a consequent decision on the merits of the claim. Therefore, this Honorable Court held that, under those circumstances, the Eighth Circuit Court of Appeals had erred in deciding upon *the merits* of plaintiff's claims. In the captioned case, however, the parties engaged in full and prolonged discovery, followed by an exhaustive dispositive motions stage, in which all relevant documents were included, and where a full record was presented. It was precisely in a document found in the record which was before the First Circuit, that said forum found the justification for its reasoning. Therefore, petitioners' reliance on Wulff is misplaced.

On the other hand, the First Circuit's actions are wholly consistent, not only with the exercise of discretion avowed by this Honorable Court in the quoted passage above, but also with "the well settled rule that the appellate court may affirm the judgment of the district court on any independently sufficient ground." Pediatricians, Inc. v. Provident Life & Acc. Ins. Co., 965 F.2d 1164, 1173 (1st Cir. 1992), quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7 (1st Cir.1990); Garside v. Osco Drug, Inc., 895 F.2d 46, 48-49 (1st Cir.1990); Polyplastics, Inc. v. Transconex, Inc., 827 F.2d 859, 860-61 (1st Cir.1987). See also Thigpen v. Roberts, 468 U.S. 27, 30 (1984) ("we may affirm on any ground that the law and the record permit and that will not expand the relief granted below."); J. E. Riley Inv. Co. v. C.I.R., 311 U.S. 55, 59 (1940); U.S. v. Levine, 477 F.3d 596, 601 (8th Cir. 2007) ("[i]t is a well-settled principle that we may affirm a district court's judgment on any basis supported by the record"), quoting

United States v. Pierson, 219 F.3d 803, 807 (8th Cir.2000); In re Plunk, 481 F.3d 302, 305 (5th Cir. 2007) (same); Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 205 (2nd Cir. 2006) (the Court of Appeals may affirm summary judgment on any basis for which there is sufficient support in the record, including grounds not relied on by the district court); In re First Alliance Mortg. Co., 471 F.3d 977, 995 (9th Cir. 2006) (same); Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 16 (1st Cir. 2004) ("we are not wedded to the trial court's reasoning, but, rather, may sustain its decree on any ground made manifest in the record"); In re Wiencko, 99 Fed.Appx. 466, *3 (4th Cir. 2004) (unpublished) (same); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir.1999) (same). City Mgmt. Corp. v. U.S. Chem. Co., Inc., 43 F.3d 244, 251 (6th Cir.1994) (same).

Finally, petitioners conveniently fail to acknowledge that *the issue* decided by the First Circuit, to wit, whether Otero was entitled to SPP benefits under the terms of the plan after being designated to a comparable position, albeit on different grounds than those relied upon by the parties or by the District Court, has always been in discussion in the case at bar. It was, precisely, the central issue to be decided upon by the various fora which have considered the case. The First Circuit made an independent, *de novo* review of the summary judgment record in the case, as it is obligated to do, and decided upon the documentary evidence before it, which established the uncontested facts. Indeed, it was precisely petitioner's reading, interpretation and reliance on the Spanish translation of the SPD which led to the First Circuit's review of the relevant documents, and to the decision that the original English SPP document controlled. Thus, petitioners cannot come now, when faced with an adverse decision, and allege that the issue was not before the First Circuit. A review of the record on appeal suffices to ascertain that the First Circuit's decision

most certainly was supported by the evidence in the record before it. Accordingly, it is respectfully asserted that this Honorable Court should decline to consider petitioners' attempted appeal on these grounds.

C. The First Circuit's decision does not create any conflict with other Circuits, which have *not* decided whether an *erroneous translation* of an SPD controls over the plan document.

Petitioners claim that the First Circuit's decision "creates a conflict with other Circuits over whether [sic] which document governs when the employer drafts an erroneous translation of an SPD". It is respectfully asserted that petitioners' argument is flawed as a matter of fact, and law. First and foremost, and petitioners' attempt at confusion notwithstanding, none of the cases cited in support of their position are even remotely related to erroneous *translations* of a summary plan description (SPD). Rather, all of the cases cited by petitioners presented conflicts between master plan documents and SPD's, where both documents were written in English. As a corollary, it must be noted that, in the case at bar, petitioners have not alleged, nor have they established, that there is any conflict in the language between the master plan document and the SPD. To the contrary, their allegation is that there is a conflict between the original SPP plan document, drafted in English by Corporate, and the eventual Spanish translation of the SPD which was circulated exclusively to the employees in the Puerto Rico Arecibo Fermentation plant. There is, quite simply, no other case law at this time regarding this issue, other than the First Circuit's decision in the case at bar.

Second, it is certainly uncontested that the SPP was sponsored by Pharmacia's parent company, Pharmacia & Upjohn (referred to throughout this brief as "Corporate"), to be

applied to "those Employees of [Pharmacia & Upjohn], and certain of its affiliates . . .".[3] SPP Section 1.02. (Emphasis ours). The SPP's language unequivocally indicates that it was meant to be applied to multiple sites, including sites in the continental United States, as well as the site where plaintiff worked in Arecibo, Puerto Rico. It is respectfully asserted that this Court's application of an erroneous *translation* into Spanish of an SPD, of which the original English version has otherwise been uniformly applied to other sites located stateside, would fly in the face of ERISA's primary goal of uniformity in the handling and interpretation of plan by plan administrators, especially when it comes to plans that are applied in sites in the several States. See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 17 (2004); Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141,148 (2001); Retail Industry Leaders Ass' v. Fielder, 475 F.3d 180, 191 (4th Cir. 2007) (noting ERISA's goal of establishing uniform, nationwide regulation of employee benefit plans); Hattem v. Schwarzenegger, 449 F.3d 423, 429 (2nd Cir. 2006); Berger v. AXA Network LLC, 459 F.3d 804, 814 (7th Cir. 2006).

In essence, then, acquiescing to petitioners' request would entail applying the SPP to a discrete group of participants in Puerto Rico in a different manner than the same plan is applied to participants anywhere else in the United States. Surely, this is contrary to the Congressional intent when establishing ERISA. The case at bar is not a typical case in which a drafter prepares a plan document and an SPD, both in English, which

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[3] This section, in turn, refers the reader to the definition of "Company"in the Plan, to wit, ". . . P&U and its affiliates that adopt the Plan with consent of the Oversight Committee". SPP Section 2.05.

conflict with each other. This case is one in which a plan administrator, whose vernacular is English, originally drafted a plan document, as well as an SPD, in English. Yet, subsequently, in an attempt to both extend the benefits afforded by the plan to Puerto Rico employees and to comply with ERISA's requirements to provide an SPD "written in a manner calculated to be understood by the average plan participant",[4] knowing that the vernacular of Puerto Rican employees is Spanish, commissioned a *translation* of the SPD *into Spanish*, with a resulting error committed by the drafter of the translation. Moreover, precisely because it was a Spanish translation of an original English language document, the Spanish SPD expressly indicated that "[t]his document is a translation into Spanish of the original document, written in English, *Pharmacia & Upjohn Company, Separation Payment Plan, SPD for Employees of Pharmacia & Upjohn Caribe, Inc.* Should there exist any discrepancy between this translation and the original document in English, *as a result of the translation of words and/or terminology*, or of the interpretation of content *in the translation*, the information in the original document will prevail. If you wish to obtain a copy of the original document in English, you may request it at the Department of Human Resources". Cover of the Spanish translation of the SPD. (Translation and emphasis ours).

This Honorable Court should therefore not apply the terms of the erroneous *translation* of the SPD, but should apply the terms of the English SPP document, from which the true intent of the original drafter of the plan can be ascertained. After all, "[t]he primary effort of [this Honorable Court's] inquiry should be to ascertain the intent of the parties or (in this case) of the

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[4] 29 U.S.C. § 1022(a)(1). See also Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995).

Plan drafter." Klebe v. Mitre Group Health Care Plan, No. 95-27281996, WL 405220, *1 (4th Cir. July 19, 1996) (unpublished disposition), quoting Glocker v. W.R. Grace & Co., 974 F.2d 540, 544 (4th Cir.1992). See also Citizens Ins. Co. of America v. Mid Michigan Health, 449 F.3d 688, 696, n. 7 (6th Cir. 2006) ("[T]he court must give effect to the intent which manifestly informs the language, despite technical shortcomings or hypothetical ambiguities in the language.", quoting Allstate Insurance Co., v. Knape, 147 F. Supp 2d 804, 809 (W.D.Mich.2001)); Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1233 (3rd Cir. 1991) ("when interpreting an ERISA severance plan, a district court should attempt to determine its intended meaning without construing it in favor of any party. Only if this factual inquiry proves fruitless should a court resort to constructions in favor of one party or another.").

Finally, and perhaps most significantly, although petitioners have showed an apparent inconsistency between the SPP and the Spanish translation of the SPD, and, at this stage of the proceedings, they have for the first time superficially alleged that Otero relied on this conflicting language in the SPD to his detriment, neither the uncontested facts nor petitioners' own allegations throughout the proceedings below support this contention. To those effects, whether applying a "detrimental reliance", or a "prejudice" standard, the fact is that most circuits agree that showing inconsistent language between a master plan document and an SPD, on its own, is not enough, and that it is necessary to establish that the participant also relied on said conflicting language, in some cases to his or her detriment. See Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51, 55 (1st Cir. 2001) ("relief is only appropriate if the participant demonstrates significant or reasonable reliance on the Plan Summary."); Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 111 (2nd Cir. 2003)

(applying a prejudice standard); Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 887-88 (8th Cir.1999) (either detrimental reliance or prejudice); Chiles v. Ceridian Corp., 95 F.3d 1505, 1519 (10th Cir.1996) (either detrimental reliance or prejudice); Andersen v. Chrysler Corp., 99 F.3d 846, 859 (7th Cir.1996) (detrimental reliance standard); Aiken v. Policy Mgmt. Sys. Corp., 13 F.3d 138, 141-42 (4th Cir.1993) (per curiam) (either detrimental reliance or prejudice); Branch v. G. Bernd Co., 955 F.2d 1574, 1578-79 (11th Cir.1992) (detrimental reliance standard); Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 n. 8 (3rd Cir.1991) (detrimental reliance standard); Govoni v. Bricklayers, Masons & Plasterers Int'l. Union of Am., Local No. 5 Pension Fund, 732 F.2d 250, 252 (1st Cir.1984) (either detrimental reliance or prejudice).

In the case at bar, as part of their Complaint before the District Court, as well as in their submissions before the First Circuit, petitioners made several specific allegations of reliance upon the SPD's terms, including that Otero was allegedly led to believe that he had until December 31, 2001 to request SPP benefits,[5] and that no one ever informed him of any changes to

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[5] Complaint, at ¶¶ 29 ("the express language of the SPP provided that its expiration date for affected employees to apply was December 31, 2001"), 62 ("[t]he SPP expressly provided that the deadline was December 31, 2001 and defendants knew that employees including plaintiff were making important retirement decisions relying on this information"), 63 ("[p]laintiff relied in [sic] the text of the SPP to select the benefits under the plan prior to December 31, 2001"). This allegation is betrayed by the SPD's own language, which only makes reference to December 31, 2001 as the date on which the SPP would *expire* as a plan. That is, that the SPP would *exist* until December 31, 2001.

this date.[6] Complaint, at ¶¶ 47 (". . .[n]o verbal or written disclosure from Pharmacia had been provided to him either changing, modifying or altering the SPP's application expiration date"), 64 ("[d]efendants failed to announce any changes to the Plan which resulted in plaintiff's lost [sic] of benefits").

At no point in the litigation below, however, did petitioners support any of their allegations on the portion of the Spanish translation of the SPD which is now in dispute. Indeed, in their Complaint petitioners repeatedly asserted that Otero considered the Microbiologist III position to which he was designated as a demotion, and not a comparable position to that which he previously held, to wit, Research Associate III. Complaint, at ¶¶ 44 ("[i]n October 2001, plaintiff was informed that the position he was confirmed had lower salary scale, less responsibilities, less professional status, etc. than the Fermentation Microbiologist position he had"), 52 (". . . defendant's false representations concerning that he would be secured in a [sic] similar duties, status, responsibilities, position"), 74 ("[d]efendants failed to offer plaintiff a similar job position while silently kept for them the change on the SPP's expiration date. . ."), 76 ("[t]he position (Microbiologist III), allegedly offered to the plaintiff constituted a demotion"), 85 ("[d]efendants concealed that the SPP date was changed in order for plaintiff to be left out without benefits and worst, a similar employment"), 106 ("[d]efendants not only concealed crucial information regarding plaintiffs' retirement benefits but

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[6] This allegation was subsequently rendered meaningless during litigation, since there were, in fact, no changes to the SPP, and petitioners simply misinterpreted its terms by assuming that they had until December 31, 2001 to "apply" for benefits, when in fact December 31, 2001 was actually the date on which the SPP would cease to exist altogether.

also, fraudulently represented to him that he would be situated in a 'similar position'. . ."). This, in clear reference to the SPP's exclusion of eligibility for benefits when a participant is given a "comparable position." However, at no time did they state, as they now posit, that the "comparable position" requirement of the SPP was not activated, or that it was not applicable to Otero because *he* was not transferred to an affiliated company. To the contrary, at all times throughout the proceedings below, including in the allegations of the complaint itself, petitioners quite simply argued that the position to which Otero was designated was not "similar" to the one he previously held, in essence conceding that the "comparable position" requirement was, in fact, applicable to him. Thus, from their own actions it is evident that it was not until now that petitioners began to "rely" on the faulty translation, in order to change their argument, and that, at no time prior to the First Circuit's decision, did they "rely" on this portion of the Spanish translation of the SPD.

In light of the above, it is evident that petitioners have not established any split in the Circuits, inasmuch as no court, other than the First Circuit, has considered the issue of conflicts between a plan document and a *translation* of its SPD. Moreover, on its merits, the application of the erroneous Spanish translation of the SPD would be contrary to ERISA's central goal of uniform application of benefits plans to all participants, especially across multiple states. Finally, petitioners have not been able to establish that they relied on the allegedly erroneous language of the Spanish translation of the SPD, to their detriment. Accordingly, this Honorable Court should decline to consider petitioners' attempted appeal on these grounds.

D. The First Circuit's decision in the case at bar is not contrary to its own precedent in Glista v. Unum Life Insurance Co. of America.

Petitioners assert that, in the case at bar, respondents provided different reasons to Otero for denying him SPP benefits, to wit, that "the so called 'windows program' had closed," and that he was ineligible to receive SPP benefits because he had been offered a comparable position with Pharmacia. Petitioners further emphatically assert that the First Circuit's upholding of respondents' actions is contrary to its own ruling in Glista v. Unum Life Insurance Co. of America, 378 F.3d 113 (1st Cir. 2004), inasmuch as "[p]lan administrators governed by ERISA must provide claimants with the specific reasons for a denial of claims and may not defend in court a denial of benefits on the basis of a different reason than that articulated to the claimant during the internal review process. Therefore, according to Glista, the reason for denying ERISA benefits cannot be modified by a plan administrator during a judicial proceeding". Petition for Writ of Certiorari, at 18. Regardless of how enthusiastically petitioners phrase their argument, however, as will be demonstrated below, the same is flawed, and should be disregarded.

Petitioners' argument seems to suggest that, in Glista, the First Circuit established a bright-line rule that a plan administrator cannot defend a denial of benefits based on a different reason than the one given to the claimant during the review process. Nothing is further from the truth. In Glista, the First Circuit was pellucid:

> We decline to adopt hard-and-fast rules as to either question . . . We also conclude that where a plan articulates *in litigation* an additional reason for denial

> of benefits that differs from the reasons articulated to the plaintiff, reviewing courts have a range of options available. . .

378 F.3d at 116. (Emphasis ours). From this passage it is evident that the First Circuit has, at no time, closed the door on considering, based on the facts of each specific case, whether a plan administrator may prevail *in litigation* on the basis of an eligibility reason which is different from the one provided to the claimant while in the midst of the internal review process. Therefore, petitioners' characterization of the First Circuit's decision in Glista is nothing more than yet another attempt to mislead this Honorable Court.[7]

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[7] Respondents must, at this juncture, demonstrate a glaring example of mischaracterization by petitioners, which is part of their discussion of this error. Before this Honorable Court, petitioners assert that "[t]he reason for the elimination of these employees' positions was due to the closing of the fermentation plant and this is an undisputed fact. Their positions were not eliminated as a result of a transfer to an affiliate [sic] business and if that was the case, none of these employees would have become eligible under the plan". Curiously, however, as part of their Complaint before the District Court, petitioners themselves made several references to the transfer of the Fermentation process to Pharmacia's affiliate in Kalamazoo, and the resulting impending termination of Otero's employment as a result of it. Complaint, at ¶¶ 21 ("On or about February 2000, Pharmacia informed the Fermentation Department's employees that the fermentation plant would be closed, *as it was going to be transferred to the United States*. Thus, plaintiff's position was going to be eliminated or terminated"), 24 (". . . several months after the announcement of the plant's transfer, plaintiff was maintained in the darkness [sic] as to whether these positions were supposedly available for him or not"). Respectfully, petitioners cannot come now and halfway allege that Otero's termination was a direct result of the closing of the Fermentation plant, without also

On the other hand, the facts in the case at bar are completely distinguishable from those in Glista. First, petitioners themselves allege, as part of their discussion of the facts, that in the case at bar Pharmacia had provided *to Otero* three different reasons for the denial of Otero's SPP benefits[8] in letters from Linda Díaz of December, 2001, June, 2003 and November, 2003, all *prior* to petitioners' filing of the complaint. Petition for Writ of Certiorari, at 5. In Glista, however, it was not until the onset of litigation, as part of a dispositive motion, that the plan administrator extended a reason for the denial of benefits that was different from its original reason. In reaching its decision, the First Circuit discussed each and every denial letter sent to plaintiff Glista, and noted that, on *none* of those previous occasions, did defendant Unum provide the reason it then attempted to bring forth in litigation. The First Circuit then held that, based on the facts of that case, Unum was barred "from raising the Symptoms Clause *for the first time in this litigation*". Glista, 378 F.3d at 129-131. (Emphasis ours). Thus, the First Circuit did not hold that Unum could not provide different reasons for its denial of benefits *during the internal review process* as petitioners would like to have this Honorable Court believe, but rather that it could not do so, in light of the specific facts of the case, at the *litigation* stage. Glista, therefore, is not applicable to the facts of the case at bar.

Finally, and most significantly, the uncontested facts of the captioned case show that, despite petitioners' fervent statements to the contrary, respondents never gave different

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acknowledging that the *reason* for the closing of the Fermentation plant was, precisely, its transfer to an affiliate in Kalamazoo.

[8] As will also be demonstrated below, this factual argument is betrayed by the uncontested facts.

reasons for the denial of Otero's SPP benefits. At this juncture, respondents are once again forced to discuss the now infamous "windows". Petitioners make much ado about a supposed "windows program" that Otero was allegedly not informed of. However, once the wheat is separated from the chaff, it is evident that their proposition is without merit, and should be disregarded.

After Pharmacia announced the closing of the Fermentation Plant and the transfer of the fermentation process to Kalamazoo, employees were told that, even if they were assigned to other positions in the Company, they would remain in the Fermentation Area as long as their positions were needed. For those who did not have a comparable position, once his or her position at the Fermentation Area was eliminated, he or she would "exit" the Company.

Once the time came for an employee to "exit", Pharmacia would contact Corporate in order for the exit process to be completed. Corporate would then "open a window", a period of 60 days, ending on the date of termination of the employee, for the exiting employee to complete all necessary paperwork, including the execution of a release agreement.

Throughout the proceedings below, petitioners simply failed to contest this fact. Despite their not wishing to understand, the fact is that a "window" is an administrative term used for a period of time the Company must reserve for any person who will be exited to comply with several applicable laws, and specifically with the OWBPA. As such, once an employee *is eligible to leave and receive SPP benefits*, he or she must be given at least forty-five (45) days, pursuant to OWBPA, to consider and sign the Separation and Release Agreement the Company required in exchange for the benefits granted. See 29 U.S.C. § 626(f). In addition, the Company

must allow the employee seven (7) days after the agreement is executed in order to revoke the agreement if he or she so wishes. See 29 U.S.C. § 626(f). In this case, Pharmacia simply "rounded up" and allowed sixty (60) days for each exiting employee to complete this process. Of the aforementioned, and nothing else, consists the referred "window."Of course, since different employees exited at different times as their individual positions were no longer needed, each had a different "window" of sixty (60) days to complete the Release Agreement process. Hence the several "windows."

From the above, it is evident that the "windows" have nothing to do with eligibility for SPP benefits, nor with the moment in which a person becomes eligible. They only come into play once the employee is, in fact, eligible for SPP benefits and the date for his or her termination approaches, as an administrative way to manage the exit. By the time Otero finally requested SPP benefits on November 5, 2001, he was simply no longer eligible for them, inasmuch as he had been designated to a comparable position. Quite literally, at that point all employees, including himself, had either exited through the plan or had been placed in comparable positions and, thus, there was no need to open any additional administrative "windows" for him to exit. As such, he was quite simply too late, and was so informed, both personally by Pharmacia personnel back in November of 2001, as well as in the letters cited by petitioners of December, 2001, June, 2003 and November, 2003.

Respondents have, at all times, been consistent in their reasons for not awarding Otero SPP benefits. Petitioners have, quite simply, refused to accept that, and are attempting to create confusion where none exists, in order to lead this Honorable Court, as well as the courts below, astray. It is respectfully asserted that this Honorable Court should, as the ones below

have, refuse to be taken down that road. Therefore, certiorari should not be granted on these grounds.

E. The First Circuit did not err when it concluded that petitioners' claims for fraudulent inducement and intentional infliction of emotional distress are preempted by ERISA.

Petitioners attempt to convince this Honorable Court that their state law claims are not preempted by ERISA, by once again attempting to confuse. This, by creating an alleged conflict between the First Circuit's decision and its own previous precedent, when it comes to considering the allegations in the complaint in order to determine whether a claim is preempted. Upon review of the cited case law in support of this proposition, however, it becomes clear that the alleged "conflict" is imagined, or even fictional. To those effects, petitioners' use of Rosario-Cordero v. Crowley Towing & Transp, Co., 46 F. 3d 120, 125 n. 2 (1st Cir. 1995) is inapposite, inasmuch as nothing in the quoted section relates to this issue. Moreover, Danca v. Private Health Care, 185 F. 3d 1 (1st Cir. 1999), involved a controversy regarding the removability of a complaint from state court, when it only mentions state law. It was in this context that the First Circuit stated that the court must look beyond the face of the complaint, to determine whether it is, in effect, a claim under ERISA, as an exception to the well-pleaded complaint rule. See Danca, 185 F.3d at 4 ("Where a claim, though couched in the language of state law, implicates an area of federal law for which Congress intended a particularly powerful preemptive sweep, the cause is deemed federal no matter how pleaded . . . This exception to the well-pleaded complaint rule is called 'complete preemption.'), quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). Alas, petitioners' reliance on these cases is, as has been previously, misguided.

Moreover, this Honorable Court need only review petitioners' arguments in their Petition to ascertain that their state law claims are, indeed, preempted by ERISA. Their attempt at confusion notwithstanding, it is evident that, although they seek damages, petitioners' allegations of fraudulent inducement and intentional infliction of emotional distress stem, precisely, from Otero's failure to secure SPP benefits. To those effects, petitioners claim that the Company's "misrepresentations prevented him from applying in a prompt manner the SPP benefits", and that, "[a]s a result, he suffered an emotional breakdown which caused him severe injuries which are the damages he claims under article 1802". Petition for Writ of Certiorari, at 22. As a corollary, they allege that Otero "could not apply of [sic] severance benefits until all fermentation in Arecibo was completed", and that he was not informed of a supposed "change in the benefits' application deadline". Petition for Writ of Certiorari, at 24. To this, we can only ask: how would this Honorable Court know what a "prompt" application for SPP benefits was, without looking at the SPP plan? Why would it result in damages to Otero that he was allegedly told that he could not apply for benefits until the Fermentation process was completed, or that he was not informed of the supposed change in deadline, other than because of these alleged expressions or omissions he did not receive SPP benefits?

The answer to these questions is simple. Petitioners cannot escape their own argument to the effects that

> [t]he fraudulent inducement claims involve the intentional actions in inducing [Otero] to keep working under the false impression that he would be able to obtain the benefits of [an SPP] 'package' once the last production was over. The inducement was false and *plaintiff lost the benefits because he stayed working*

under Pharmacia's representations that he could not seek the benefits.

Petition for Writ of Certiorari, at 24. (Emphasis ours).

In essence, then, petitioners are attempting to obtain a remedy in damages instead of, or as a supplement to, the remedy set forth by ERISA Section 502(a)(1)(b), or even ERISA Section 510. The net result of the alleged misrepresentations by respondents was that Otero did not receive SPP benefits. According to petitioners, this event, in turn, led to damages. This, however, is an unattainable position. To those effects, while citing plenty of case law from some Circuits and several Districts in support of their position, petitioners curiously fail to acknowledge this Honorable Court's decision in Aetna Health v. Davila, 542 U.S. 200 (2004), which disposes of the controversy in the case at bar, in light of petitioners' own allegations. In Davila, this Honorable Court held, in no uncertain terms, that ERISA was the exclusive remedy available for claims such as these and that, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Id. at 209.

In light of the above discussion, it is respectfully asserted that both the District Court, as well as the First Circuit, correctly concluded that petitioners' claims for fraudulent inducement/fraudulent concealment, as well as for intentional infliction of emotional distress, were preempted by ERISA. As such, this Honorable Court should not consider petitioners' appeal.

CONCLUSION

As was demonstrated above, Petitioners' position is misplaced. The First Circuit acted correctly when it affirmed the District Court's Judgment in its entirety. As such, the instant Petition for Writ of Certiorari should be denied by this Honorable Court.

This 16th day of May, 2007.

Respectfully submitted,

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